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ABSTRACT

Presented are August 23, 1977 regulations for Part B of the Education of the Handicapped Act (as required by the Education for all Handicapped Children Act of 1975, P.L. 94-142). Regulations are noted to amend the existing regulations governing assistance to states for education of handicapped children, to add a new part on incentive grants programs for handicapped children aged 3 through 5 years, and to make certain conforming amendments to the general provisions for state-administered programs. Included are provisions which are designed to assure that all handicapped children have available to them a free appropriate public education, to assure that the rights of handicapped children and their parents are protected, to assist states and localities in providing for the education of handicapped children, and to assess and assure the effectiveness of educational efforts to handicapped children. (SBH)

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TUESDAY, AUGUST 23, 1977

PART II

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office of Education

■

EDUCATION OF HANDICAPPED CHILDREN

Implementation of Part B of the Education of the Handicapped Act

EC102238

Title 45—Public Welfare

CHAPTER I—OFFICE OF EDUCATION, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

EDUCATION OF HANDICAPPED CHILDREN

Implementation of Part B of the Education of the Handicapped Act

AGENCY: U.S. Office of Education, HEW.

ACTION: Final regulation.

SUMMARY: These regulations implement amendments to Part B of the Education of the Handicapped Act (as required by the Education for All Handicapped Children Act of 1975) by: (1) amending the existing regulations governing assistance to States for education of handicapped children, (2) adding a new part on incentive grants programs for handicapped children aged three through five, and (3) making certain conforming amendments to the general provisions for State-administered programs.

These regulations govern the provision of formula grant funds to State and local educational agencies to assist them in the education of handicapped children.

The regulations include provisions which are designed (1) to assure that all handicapped children have available to them a free appropriate public education; (2) to assure that the rights of handicapped children and their parents are protected; (3) to assist States and localities to provide for the education of handicapped children; and (4) to assess and assure the effectiveness of efforts to educate such children.

These regulations also include the final rules for counting and reporting handicapped children. (The child count rules were published in proposed form on September 8, 1976, and were incorporated into the December 30 proposed regulations for the convenience of the reader.)

EFFECTIVE DATE: October 1, 1977.

FOR FURTHER INFORMATION CONTACT:

Daniel Ringelheim, Director, Division of Assistance to States, Bureau of Education for the Handicapped, 400 Maryland Ave. SW., (room 4046 Donohoe Building), Washington, D.C. 20202, telephone: 202-472-2265;

or

Thomas B. Irvin, Policy Officer, Bureau of Education for the Handicapped, 400 Maryland Ave. SW., (room 4926 Donohoe Building), Washington, D.C. 20202, telephone: 202-245-9405.

SUPPLEMENTARY INFORMATION:

RULEMAKING HISTORY—PUBLIC PARTICIPATION

Because of the potential impact that Pub. L. 94-142 will have on the education of handicapped children throughout the Nation, and on the agencies that serve them, the Office of Education recognized the need for intensive public participation in the development of regulations, and took steps to insure maximum public involvement throughout the entire rulemaking process. A description of these steps is included in the following paragraphs:

Before the proposed rules were drafted, the Office of Education carried out a massive effort to obtain comments and suggestions for developing regulations from interested parties throughout the Nation. This involved participating in approximately 20 meetings about the law conducted on both a geographic and special interest basis. Approximately 2,200 people participated in these meetings and several hundred comments were received.

In June 1976, the Office of Education convened a national writing group of approximately 170 people to develop concept papers for use in writing the regulations. This group was composed of parents, representatives of special interest organizations (i.e., AFT, NEA, private schools), and administrators of State and local schools. These concept papers formed the basis for the proposed regulations.

During the months of July-November, the Office of Education prepared several redrafts of the concept papers and continued to seek inputs on these drafts from various interested parties.

On December 30, 1976, the proposed rules were published in the FEDERAL REGISTER. Written comments and recommendations on the proposed rules were invited for a 60-day comment period ending March 1, 1977; and public hearings were held in Washington, San Francisco, Denver, Chicago, Boston, and Atlanta. Over 1,600 written comments were received during that period, all of which were reviewed and considered by the Office of Education in preparing these final regulations.

The tapes of the hearings and copies of written comments are available for public inspection at the Bureau of Education for the Handicapped, room 4921, Donohoe Building, 400 6th Street SW., Washington, D.C. 20202.

In addition to the above public comment activities, the Office of Education continued with other public participation efforts, including:

(1) Participating in 10 regional meetings of the American Association of School Administrators and other regional meetings with the Council of the Great City Schools;

(2) Conducting a national conference on the regulations for administrators of various State agency programs for the handicapped, and participating in meetings at other national conferences; and

(3) Participating in a special series of meetings organized by the Institute for Educational Leadership and composed of representatives of the National Governors' Conference, the National Conference of State Legislatures, the National Association of State Boards of Education, and the Education Commission of the States.

ACTION TAKEN ON PUBLIC COMMENTS

PART 100B—STATE ADMINISTERED PROGRAMS

No comments were received on the proposed amendments to Part 100b, and no changes have been made.

PART 121A—ASSISTANCE TO STATES FOR EDUCATION OF HANDICAPPED CHILDREN

The Office of Education conducted a careful review of the public comments received and summarized them by subpart and topic.

A very large number of comments dealt with specific statutory requirements. These comments expressed concerns about the statute and suggested changes to be made in the statutory provisions. However, because they are statutory, the Office of Education is not able to make any changes in the regulations with respect to those points. Some of the statutory provisions on which comments were received, together with concerns about them, are included below:

(1) Free appropriate public education—problems with timelines and concerns about the cost of implementing this requirement;

(2) Priorities—concerns about Federal priorities which are not consistent with State and local priorities;

(3) Individualized education programs—suggestions that the requirement be deleted from the regulation unless more funds are available for implementing it;

(4) Prior notice and other due process procedures—concerns about the amount of detail in these requirements and the time, cost and paper work involved in their implementation;

(5) State educational agency responsibility for general supervision of all special education programs in the State—concerns about lack of authority over other State agencies and the lack of funds to efficiently implement the provision;

(6) Child count—concerns about the dates on which the count must be taken.

Another large number of commenters cited specific concerns or issues with respect to the content of the proposed rules. Because of the large number of comments received, individual comments have been consolidated.

PART 121M—INCENTIVE GRANTS

Part 121m sets forth the conditions under which States may receive grants to assist in the education of handicapped children aged three through five. Congress established incentive grants in the recognition that when education begins at the earlier stages of development (1) benefits are maximized, (2) additional or more severe handicaps may be prevented, and (3) greater long-term cost effectiveness is realized.

Comment: An issue was raised concerning the possible use of incentive grant funds for children from birth through two years of age.

Response: Section 619 of the Act and the legislative history specify that the use of incentive grant funds is limited to children aged three through five years. However, the State's entitlement under section 611 of the Act may be used for children from birth through age twenty-one.

Comment: An issue was raised as to whether incentive grant funds may be

used for administrative or supervisory costs.

Response: The regulation has been amended to make it clear that administrative costs are allowable.

MINIMUM REGULATION—FUTURE RULEMAKING PLANS

The preamble to the proposed rules contained the following statement regarding minimum regulations:

The Department sees the development of regulations for implementing Pub. L. 94-142 as being an evolutionary process which will continue over a period of several years. The actual impact and consequences of the statutory provisions and problems which State and local educational agencies may have in implementing these provisions are not known at this time. Therefore, the Department feels that the most rational approach to follow is (1) to write minimum regulations at this point, and (2) to amend and revise such regulations in the future as need and experience dictate.

Because the Statute is very comprehensive and specific on many points, the Department has elected (1) to incorporate the basic wording or substance of the Statute directly into the regulations, and (2) to expand on the statutory provisions only where additional interpretation sems to be necessary.

Although some commenters felt that more extensive regulations were necessary, many persons who responded to the proposed rules felt that the Office of Education had already over-regulated and should cut back on the rules when they are published in final form. At this juncture, the Office of Education holds to the same position that it took in the proposed rules, and for the same reasons as set forth in that document.

The Office of Education believes that some working experience with this regulation is essential before determining whether there is a need to amend it. Once the regulation becomes effective (Oct. 1, 1977) and people gain experience in implementing it, there will likely be a series of questions raised in individual States which could result in the development of policies and interpretations that would be proposed for addition to these regulations.

OVERVIEW OF CHANGES IN THE PART 121a REGULATIONS

A substantial number of changes have been made in response to comments received on the proposed rules. However, few of these changes have resulted in adding major substantive requirements. Most of the changes are technical or have been made in an attempt to provide greater clarity or to add more explanatory material.

Extensive use has been made of explanatory comments in the text of the regulations. The purpose of these comments is to attempt, where appropriate, to clarify or further interpret a particular rule, or to provide direction and assistance without imposing additional requirements. For example, an extensive explanation is included under the excess cost requirement and an example is given on how to make the computation under that requirement.

ORGANIZATION OF REGULATIONS

Three parts of Title 45 of the Code of Federal Regulations are amended by this document:

(1) Part 100b—*State Administered Programs.* This includes certain conforming amendments to the regulations under section 434(b)(1)(A) of the General Education Provisions Act.

(2) Part 121a—*Assistance to States for Education of Handicapped Children.* This is divided into seven subparts: (A) General, (B) State Annual Program Plans and Local Applications, (C) Services, (D) Private Schools, (E) Procedural Safeguards, (F) State Administration, and (G) Allocation of Funds and Reports.

(3) Part 121m—*Incentive Grants.* This governs the administration of the incentive grants program for handicapped children aged three through five, authorized under section 619 of the Act.

ANALYSIS OF REGULATIONS

Appendix A of Part 121a includes an analysis of each subpart, which (1) discusses significant comments received and the action taken with respect to those comments, and (2) explains the basis for any changes made from the proposed rules published on December 30, 1976.

TOPICAL INDEX

Appendix B of Part 121a includes an index of the major topics in the regulations (e.g., free appropriate public education, priorities, and individualized education program) and the specific sections under which each term is used.

NOTE.—The Department of Health, Education, and Welfare, has determined that this document contains a major proposal requiring preparation of an Economic Impact Analysis (EIA) Statement under Executive Orders 11821 and 11949 and OMB Circular A-107, and certifies that an Economic Impact Analysis has been prepared. However, because the portion of this regulation involving major costs is virtually identical to the content of subpart D of the regulation issued on discrimination against the handicapped under section 504 of the Rehabilitation Act of 1973 (45 CFR Part 84; published May 4, 1977, at 42 FR 22675), the Department has determined that (a) this regulation involves no substantial costs not imposed by Part 84 and (b) the pertinent parts of the EIA Statement for that regulation meet the EIA requirements for this regulation. Both regulations impose the following requirements: (1) appropriate education to handicapped children; (2) identification and evaluation of handicapped children; and (3) procedural safeguards for handicapped children and their parents.

(Catalog of Federal Domestic Assistance Number 13.449, Education of Handicapped Children, Part B.)

Dated: August 12, 1977.

JOHN ELLIS,
Acting U.S. Commissioner of Education.

Approved: August 15, 1977.

HALE CHAMPION,
Acting Secretary of Health, Education, and Welfare.

Title 45 of the Code of Federal Regulations is amended as follows:

PART 100b—STATE ADMINISTERED PROGRAMS

1. In Part 100b, § 100b.17 is revised to read as follows:

§ 100b.17 General applications.

(a) The general application of a State must meet the requirements of section 434(b)(1)(A) of the General Education Provisions Act.

(b) A State does not have to resubmit its general application.

(20 U.S.C. 1232c(b)(1)(A).)

(c)(1) The following statutes require that a State must submit certain provisions to the Commissioner which are similar to provisions in the general application.

(2) Subject to paragraph (d) of this section, if the Commissioner has approved a State's general application, the State does not have to submit the provisions required under the following statutes:

(i) *Compensatory education.* Section 142(a) (2) and (3) of Title I of the Elementary and Secondary Education Act of 1965, as amended.

(20 U.S.C. 1232c(b)(1)(A)(ii) (II), (III).)

(ii) *School library resources.* Section 203(a) (5), (6) and (7) of Title II of the Elementary and Secondary Education Act of 1965, as amended.

(20 U.S.C. 1232c(b)(1)(A)(ii) (II), (III), and (IV).)

(iii) *Supplementary educational centers and services; guidance, counseling, and testing.* Section 305(b) (9)(B), (10), and (11) of Title II of the Elementary and Secondary Education Act of 1965, as amended.

(20 U.S.C. 1232c(b)(1)(A)(ii) (II), (III) and (IV).)

(iv) *Education of the handicapped.* Section 613(a) (7)(A), (9)(B), and (10) of Part B of the Education of the Handicapped Act, as amended.

(20 U.S.C. 1232c(b)(1)(A)(ii) (II), (III) and (IV).)

(v) *Adult education.* Section 306(a) (6) and (7) of the Adult Education Act, as amended.

(20 U.S.C. 1232c(b)(1)(A)(ii) (II), (III).)

(vi) *Strengthening instruction in academic subjects.* Section 1004(a) (2) and (3) of Title X of the National Defense Education Act of 1958, as amended.

(20 U.S.C. 1232c(b)(1)(A)(ii), (II), (III).)

(vii) *State reading improvement programs.* Section 714(a)(10) of Title VII-B of the Education Amendments of 1974.

(20 U.S.C. 1232c(b)(1)(A)(ii), (III).)

(d)(1) The general application does not change the legal substance of the provisions listed under paragraph (c)(2) of this section.

(2) If a provision listed in paragraph (c)(2) of this section is different in wording from an assurance in the general application, the provision listed in that paragraph governs any question of compliance with the assurance.

(20 U.S.C. 1232c(b)(1)(B)(i), (b)(1)(B)(iii), (b)(2).)

2. In Part 100b, § 100b.35 is revised to read as follows:

§ 100b.35 Effective date of an application, plan, or amendment.

(a) Federal funds are available only for obligations incurred under:

(1) A State plan approved by the Commissioner (in the case of the programs set forth in § 100b.10 other than those referenced in § 100b.15(a)); or

(2) A general application and an annual program plan approved by the Commissioner in the case of the programs referenced in § 100b.15(a)).

(b) A State plan, general application, annual program plan, or amendment to any of them, is effective on the date the State submits it to the Federal Government in substantially approvable form. However, the effective date cannot be earlier than the first day of the fiscal period for which it is submitted.

(c) The Commissioner sends the State agency a notice of approval, including notice of the effective date, when the application, plan, or amendment is approved.

(d) Federal funds are not available for obligation by a State or local agency before the effective date of the State plan or annual program plan (whichever is submitted under paragraph (a) of this section). If funds are expressly made available by statute for the development of the State plan, general application, or annual program plan, the first sentence of this paragraph does not apply to obligations by the State for that purpose.

(20 U.S.C. 1221e-3(a)(1).)

3. In Part 100b, § 100b.55 is revised to read as follows:

§ 100b.55 Obligation by recipients.

(a) *Period for obligation.* Federal funds which the Federal government may obligate during a fiscal period remain available for obligation by State and local recipients through the end of that fiscal period. Federal funds made available for construction of facilities remain available for obligation by State and local recipients for that purpose for a reasonable period of time as determined by the Commissioner.

(b) *Carryovers.* In accordance with section 414(b) of the General Education Provisions Act, any Federal funds which are not obligated by State and local recipients before the end of the fiscal period under paragraph (a) of this section, remain available for obligation by those agencies for one additional fiscal year.

(c) *Determinations of obligation.* (1) An obligation for the acquisition of real or personal property, for the construction of facilities, or for the performance of work, is incurred by a recipient on the date it makes a binding written commitment.

(2) An obligation for personal services, for services performed by public utilities, for travel, or for the rental of real or personal property, is incurred by a recipient on the date it receives the services, its personnel takes the travel, or it uses the rented property.

(20 U.S.C. 1221c(a), 1225(b); 1232c(b)(1)(A)(ii)(II).)

4. Part 121a is revised to read as follows:

PART 121a—ASSISTANCE TO STATES FOR EDUCATION OF HANDICAPPED CHILDREN

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Appendix A—Analysis of Final Regulation. (45 CFR Part 121a.) Under Part B of the Education of the Handicapped Act.

Appendix B—Index to Part 121a.

AUTHORITY: Part B of the Education of the Handicapped Act, Pub. L. 91-230, Title VI, as amended, 89 Stat. 776-794 (20 U.S.C. 1411-1420), unless otherwise noted.

Subpart A—General

PURPOSE, APPLICABILITY, AND GENERAL PROVISIONS REGULATIONS

§ 121a.1 Purpose.

The purpose of this part is:

(a) To insure that all handicapped children have available to them a free appropriate public education which in-

cludes special education and related services to meet their unique needs,

(b) To insure that the rights of handicapped children and their parents are protected,

(c) To assist States and localities to provide for the education of all handicapped children, and

(d) To assess and insure the effectiveness of efforts to educate those children.

(20 U.S.C. 1401 Note.)

§ 121a.2 Applicability to State, local, and private agencies.

(a) *States.* This part applies to each State which receives payments under Part B of the Education of the Handicapped Act.

(b) *Public agencies within the State.* The annual program plan is submitted by the State educational agency on behalf of the State as a whole. Therefore, the provisions of this part apply to all political subdivisions of the State that are involved in the education of handicapped children. These would include: (1) The State educational agency, (2) local educational agencies and intermediate educational units, (3) other State agencies and schools (such as Departments of Mental Health and Welfare and State schools for the deaf or blind), and (4) State correctional facilities.

(c) *Private schools and facilities.* Each public agency in the State is responsible for insuring that the rights and protections under this part are given to children referred to or placed in private schools and facilities by that public agency.

(See §§ 121a.400–121a.403.)

(20 U.S.C. 1412(1), (6); 1413(a); 1413(a)(4)(B).)

Comment. The requirements of this part are binding on each public agency that has direct or delegated authority to provide special education and related services in a State that receives funds under Part B of the Act, regardless of whether that agency is receiving funds under Part B.

§ 121a.3 General provisions regulations.

Assistance under Part B of the Act is subject to Parts 100, 100b, 100c, and 121 of this chapter, which include definitions and requirements relating to fiscal, administrative, property management, and other matters.

(20 U.S.C. 1417(b).)

DEFINITIONS

Comment. Definitions of terms that are used throughout these regulations are included in this subpart. Other terms are defined in the specific subparts in which they are used. Below is a list of those terms and the specific sections and subparts in which they are defined:

Consent (Section 121a.500 of Subpart E)
Destruction (Section 121a.560 of Subpart E)
Direct services (Section 121a.370(b)(1) of Subpart C)
Evaluation (Section 121a.500 of Subpart E)
First priority children (Section 121a.320(a) of Subpart C)
Independent educational evaluation (Section 121a.503 of Subpart E)
Individualized education program (Section 121a.340 of Subpart C)
Participating agency (Section 121a.560 of Subpart E)
Personally identifiable (Section 121a.500 of Subpart E)
Private school handicapped children (Section 121a.450 of Subpart D)
Public expense (Section 121a.503 of Subpart E)
Second priority children (Section 121a.320(b) of Subpart C)
Special definition of "State" (Section 121a.700 of Subpart G)
Support services (Section 121a.370(b)(2) of Subpart C)

§ 121a.4 Free appropriate public education.

As used in this part, the term "free appropriate public education" means special education and related services which:

(a) Are provided at public expense, under public supervision and direction, and without charge.

(b) Meet the standards of the State educational agency, including the requirements of this part,

(c) Include preschool, elementary school, or secondary school education in the State involved, and

(d) Are provided in conformity with an individualized education program which meets the requirements under §§ 121a.340–121a.349 of Subpart C.

(20 U.S.C. 1401(18).)

§ 121a.5 Handicapped children.

(a) As used in this part, the term "handicapped children" means those children evaluated in accordance with §§ 121a.530–121a.534 as being mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, other health impaired, deaf-blind, multi-handicapped, or as having specific learning disabilities, who because of those impairments need special education and related services.

(b) The terms used in this definition are defined as follows:

(1) "Deaf" means a hearing impairment which is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification, which adversely affects educational performance.

(2) "Deaf-blind" means concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational problems that they cannot be accommodated in special education programs solely for deaf or blind children.

(3) "Hard of hearing" means a hearing impairment, whether permanent or fluctuating, which adversely affects a child's educational performance but which is not included under the definition of "deaf" in this section.

(4) "Mentally retarded" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period, which adversely affects a child's educational performance.

(5) "Multihandicapped" means concomitant impairments (such as mentally retarded-blind, mentally retarded-orthopedically impaired, etc.), the combination of which causes such severe educational problems that they cannot be accommodated in special education programs solely for one of the impairments. The term does not include deaf-blind children.

(6) "Orthopedically impaired" means a severe orthopedic impairment which adversely affects a child's educational performance. The term includes impairments caused by congenital anomaly (e.g., clubfoot, absence of some member, etc.), impairments caused by disease (e.g. poliomyelitis, bone tuberculosis, etc.), and impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns which cause contractures).

(7) "Other health impaired" means limited strength, vitality or alertness, due to chronic or acute health problems such as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, or diabetes, which adversely affects a child's educational performance.

(8) "Seriously emotionally disturbed" is defined as follows:

(i) The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree, which adversely affects educational performance:

(A) An inability to learn which cannot be explained by intellectual, sensory, or health factors;

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

(C) Inappropriate types of behavior or feelings under normal circumstances;

(D) A general pervasive mood of unhappiness or depression; or

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) The term includes children who are schizophrenic or autistic. The term does not include children who are socially maladjusted, unless it is determined that they are seriously emotionally disturbed.

(9) "Specific learning disability" means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations. The term includes such conditions as perceptual handicaps, brain injury, minimal brain disfunction, dyslexia, and developmental aphasia. The term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, or of environmental, cultural, or economic disadvantage.

(10) "Speech impaired" means a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, which

adversely affects a child's educational performance.

(11) "Visually handicapped" means a visual impairment which, even with correction, adversely affects a child's educational performance. The term includes both partially seeing and blind children.

(20 U.S.C. 1401(1), (15).)

§ 121a.6 Include.

As used in this part, the term "include" means that the items named are not all of the possible items that are covered, whether like or unlike the ones named.

(20 U.S.C. 1417(b).)

§ 121a.7 Intermediate educational unit.

As used in this part, the term "intermediate educational unit" means any public authority, other than a local educational agency, which:

(a) Is under the general supervision of a State educational agency;

(b) Is established by State law for the purpose of providing free public education on a regional basis; and

(c) Provides special education and related services to handicapped children within that State.

(20 U.S.C. 1401(22).)

§ 121a.8 Local educational agency.

(a) As used in this part, the term "local educational agency" means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools. Such term also includes any other public institution or agency having administrative control and direction of a public elementary or secondary school.

(b) For the purposes of this part, the term "local educational agency" also includes intermediate educational units.

(20 U.S.C. 1401(8).)

§ 121a.9 Native language.

As used in this part, the term "native language" has the meaning given that term by section 703(a)(2) of the Bilingual Education Act, which provides as follows:

> The term "native language", when used with reference to a person of limited English-speaking ability, means the language normally used by that person, or in the case of a child, the language normally used by the parents of the child.

(20 U.S.C. 880b-1(a)(2); 1401(21).)

Comment. Section 602(21) of the Education of the Handicapped Act states that the term "native language" has the same meaning as the definition from the Billingual Education Act. (The term is used in the prior notice and evaluation sections under § 121a.505(b)(2) and § 121a.532(a)(1) of Subpart E.) In using the term, the Act does not prevent the following means of communication:

(1) In all direct contact with a child (including evaluation of the child), communication would be in the language normally used by the child and not that of the parents, if there is a difference between the two.

(2) If a person is deaf or blind, or has no written language, the mode of communication would be that normally used by the person (such as sign language, braille, or oral communication).

§ 121a.10 Parent.

As used in this part, the term "parent" means a parent, a guardian, a person acting as a parent of a child, or a surrogate parent who has been appointed in accordance with § 121a.514. The term does not include the State if the child is a ward of the State.

(20 U.S.C. 1415.)

Comment. The term "parent" is defined to include persons acting in the place of a parent, such as a grandmother or stepparent with whom a child lives, as well as persons who are legally responsible for a child's welfare.

§ 121a.11 Public agency.

As used in this part, the term "public agency" includes the State educational agency, local educational agencies, intermediate educational units, and any other political subdivisions of the State which are responsible for providing education to handicapped children.

(20 U.S.C. 1412(2)(B); 1412(6); 1413(a).)

§ 121a.12 Qualified.

As used in this part, the term "qualified" means that a person has met State educational agency approved or recognized certification, licensing, registration, or other comparable requirements which apply to the area in which he or she is providing special education or related services.

(20 U.S.C. 1417(b).)

§ 121a.13 Related services.

(a) As used in this part, the term "related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of disabilities in children, counseling services, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training.

(b) The terms used in this definition are defined as follows:

(1) "Audiology" includes:

(i) Identification of children with hearing loss;

(ii) Determination of the range, nature, and degree of hearing loss, including referral for medical or other professional attention for the habilitation of hearing;

(iii) Provision of habilitative activities, such as language habilitation, auditory training, speech reading (lip-reading), hearing evaluation, and speech conservation;

(iv) Creation and administration of programs for prevention of hearing loss;

(v) Counseling and guidance of pupils, parents, and teachers regarding hearing loss; and

(vi) Determination of the child's need for group and individual amplification, selecting and fitting an appropriate aid, and evaluating the effectiveness of amplification.

(2) "Counseling services" means services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel.

(3) "Early identification" means the implementation of a formal plan for identifying a disability as early as possible in a child's life.

(4) "Medical services" means services provided by a licensed physician to determine a child's medically related handicapping condition which results in the child's need for special education and related services.

(5) "Occupational therapy" includes:

(i) Improving, developing or restoring functions impaired or lost through illness, injury, or deprivation;

(ii) Improving ability to perform tasks for independent functioning when functions are impaired or lost; and

(iii) Preventing, through early intervention, initial or further impairment or loss of function.

(6) "Parent counseling and training" means assisting parents in understanding the special needs of their child and providing parents with information about child development.

(7) "Physical therapy" means services provided by a qualified physical therapist.

(8) "Psychological services" include:

(i) Administering psychological and educational tests, and other assessment procedures;

(ii) Interpreting assessment results;

(iii) Obtaining, integrating, and interpreting information about child behavior and conditions relating to learning.

(iv) Consulting with other staff members in planning school programs to meet the special needs of children as indicated by psychological tests, interviews, and behavioral evaluations; and

(v) Planning and managing a program of psychological services, including psychological counseling for children and parents.

(9) "Recreation" includes:

(i) Assessment of leisure function;

(ii) Therapeutic recreation services;

(iii) Recreation programs in schools and community agencies; and

(iv) Leisure education.

(10) "School health services" means services provided by a qualified school nurse or other qualified person.

(11) "Social work services in schools" include:

(i) Preparing a social or developmental history on a handicapped child;

(ii) Group and individual counseling with the child and family;

(iii) Working with those problems in a child's living situation (home, school, and community) that affect the child's adjustment in school; and

(iv) Mobilizing school and community resources to enable the child to receive maximum benefit from his or her educational program.

(12) "Speech pathology" includes:

(i) Identification of children with speech or language disorders;

(ii) Diagnosis and appraisal of specific speech or language disorders;

(iii) Referral for medical or other professional attention necessary for the habilitation of speech or language disorders;

(iv) Provision of speech and language services for the habilitation or prevention of communicative disorders; and

(v) Counseling and guidance of parents, children, and teachers regarding speech and language disorders.

(13) "Transportation" includes:

(i) Travel to and from school and between schools,

(ii) Travel in and around school buildings, and

(iii) Specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a handicapped child.

(20 U.S.C. 1401(17).)

Comment. With respect to related services, the Senate Report states:

The Committee bill provides a definition of "related services," making clear that all such related services may not be required for each individual child and that such term includes early identification and assessment of handicapping conditions and the provision of services to minimize the effects of such conditions.

(Senate Report No. 94-168, p.12 (1975).)

The list of related services is not exhaustive and may include other developmental, corrective, or supportive services (such as artistic and cultural programs, and art, music, and dance therapy), if they are required to assist a handicapped child to benefit from special education.

There are certain kinds of services which might be provided by persons from varying professional backgrounds and with a variety of operational titles, depending upon requirements in individual States. For example, counseling services might be provided by social workers, psychologists, or guidance counselors; and psychological testing might be done by qualified psychological examiners, psychometrists, or psychologists, depending upon State standards.

Each related service defined under this part may include appropriate administrative and supervisory activities that are necessary for program planning, management, and evaluation.

§ 121a.14 Special education.

(a)(1) As used in this part, the term "special education" means specially designed instruction, at no cost to the parent, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

(2) The term includes speech pathology, or any other related service, if the service consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a handicapped child, and is considered "special education" rather than a "related service" under State standards.

(3) The term also includes vocational education if it consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a handicapped child.

(b) The terms in this definition are defined as follows:

(1) "At no cost" means that all specially designed instruction is provided without charge, but does not preclude incidental fees which are normally charged to non-handicapped students or their parents as a part of the regular education program.

(2) "Physical education" is defined as follows:

(i) The term means the development of:

(A) Physical and motor fitness;

(B) Fundamental motor skills and patterns; and

(C) Skills in aquatics, dance, and individual and group games and sports (including intramural and lifetime sports).

(ii) The term includes special physical education, adapted physical education, movement education, and motor development.

(20 U.S.C. 1401(16).)

(3) "Vocational education" means organized educational programs which are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career requiring other than a baccalaureate or advanced degree.

(20 U.S.C. 1401(16).)

Comment. (1) The definition of "special education" is a particularly important one under these regulations, since a child is not handicapped unless he or she needs special education. (See the definition of "handicapped children" in section 121a.5.) The definition of "related services" (section 121a.13) also depends on this definition, since a related service must be necessary for a child to benefit from special education. Therefore, if a child does not need special education, there can be no "related services," and the child (because not "handicapped") is not covered under the Act.

(2) The above definition of vocational education is taken from the Vocational Education Act of 1963, as amended by Pub. L. 94-482. Under that Act, "vocational education" includes industrial arts and consumer and homemaking education programs.

§ 121a.15 State.

As used in this part, the term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virginia Islands, and the Trust Territory of the Pacific Islands.

(20 U.S.C. 1401(6).)

Subpart B—State Annual Program Plans and Local Applications

Annual Program Plans—General

§ 121a.110 Condition of assistance.

In order to receive funds under Part B of the Act for any fiscal year, a State must submit an annual program plan to the Commissioner through its State educational agency.

(20 U.S.C. 1232c(b), 1412, 1413.)

§ 121a.111 Contents of plan.

Each annual program plan must contain the provisions required in this subpart.

(20 U.S.C. 1412, 1413, 1232c(b).)

§ 121a.112 Certification by the State educational agency and attorney general.

Each annual program plan must include:

(a) A certification by the officer of the State educational agency authorized to submit the plan that:

(1) The plan has been adopted by the State educational agency, and

(2) The plan is the basis for the operation and administration of the activities to be carried out in that State under Part B of the Act; and

(b) A certification by the State Attorney General or other authorized State legal officer that:

(1) The State educational agency has authority under State law to submit the plan and to administer or to supervise the administration of the plan, and

(2) All plan provisions are consistent with State law.

(20 U.S.C. 1413(a).)

§ 121a.113 Approval; disapproval.

(a) The Commissioner shall approve any annual program plan which meets the requirements of this part and Subpart B of Part 100b of this chapter.

(b) The Commissioner shall disapprove any annual program plan which does not meet those requirements but may not finally disapprove a plan before giving reasonable notice and an opportunity for a hearing to the State educational agency.

(c) The Commissioner shall use the procedures set forth in §§ 121a.580-121a.583 of Subpart E for a hearing under this section.

(20 U.S.C. 1413(c).)

§ 121a.114 Effective period of annual program plan.

(a) Each annual program plan is effective for a period from the date it becomes effective under § 100b.35 of this chapter through the following June 30.

(b) The Commissioner may extend the effective period of an annual program plan, on the request of a State, if the plan meets the requirements of this part and Part B of the Act.

(20 U.S.C. 1413(a), 1232c(b).)

ANNUAL PROGRAM PLANS—CONTENTS

§ 121a.120 Public participation.

(a) Each annual program plan must include procedures which insure that the requirements in §§ 121a.280–121a.284 are met.

(b) Each annual program plan must also include the following:

(1) A statement describing the methods used by the State educational agency to provide notice of the public hearings on the annual program plan. The statement must include:

(i) A copy of each news release and advertisement used to provide notice,

(ii) A list of the newspapers and other media in which the State educational agency announced or published the notice, and

(iii) The dates on which the notice was announced or published.

(2) A list of the dates and locations of the public hearings on the annual program plan.

(3) A summary of comments received by the State educational agency and a description of the modifications that the State educational agency has made in the annual program plan as a result of the comments.

(4) A statement describing the methods by which the annual program plan will be made public after its approval by the Commissioner. This statement must include the information required under paragraph (b)(1) of this section.

(20 U.S.C. 1412(7).)

§ 121a.121 Right to a free appropriate public education.

(a) Each annual program plan must include information which shows that the State has in effect a policy which insures that all handicapped children have the right to a free appropriate public education within the age ranges and timelines under § 121a.122.

(b) The information must include a copy of each State statute, court order, State Attorney General opinion, and other State document that shows the source of the policy.

(c) The information must show that the policy:

(1) Applies to all public agencies in the State;

(2) Applies to all handicapped children;

(3) Implements the priorities established under § 121a.127(a)(1) of this subpart; and

(4) Establishes timelines for implementing the policy, in accordance with § 121a.122.

(20 U.S.C. 1412(1)(2)(B), (6); 1413(a)(3).)

§ 121a.122 Timeliness and ages for free appropriate public education.

(a) *General.* Each annual program plan must include in detail the policies and procedures which the State will undertake or has undertaken in order to insure that a free appropriate public education is available for all handicapped children aged three through eighteen within the State not later than September 1, 1978, and for all handicapped children aged three through twenty-one within the State not later than September 1, 1980.

(b) *Documents relating to timelines.* Each annual program plan must include a copy of each statute, court order, attorney general decision, and other State document which demonstrates that the State has established timelines in accordance with paragraph (a) of this section.

(c) *Exception.* The requirement in paragraph (a) of this section does not apply to a State with respect to handicapped children aged three, four, five, eighteen, nineteen, twenty, or twenty-one to the extent that the requirement would be inconsistent with State law or practice, or the order of any court, respecting public education for one or more of those age groups in the State.

(d) *Documents relating to exceptions.* Each annual program plan must:

(1) Describe in detail the extent to which the exception in paragraph (c) of this section applies to the State, and

(2) Include a copy of each State law, court order, and other document which provides a basis for the exception.

(20 U.S.C. 1412(2)(B).)

§ 121a.123 Full educational opportunity goal.

Each annual program plan must include in detail the policies and procedures which the State will undertake, or has undertaken, in order to insure that the State has a goal of providing full educational opportunity to all handicapped children aged birth through twenty-one.

(20 U.S.C. 1412(2)(A).)

§ 121a.124 Full educational opportunity goal—data requirement.

Beginning with school year 1978–1979, each annual program plan must contain the following information:

(a) The estimated number of handicapped children who need special education and related services.

(b) For the current school year:

(1) The number of handicapped children aged birth through two, who are receiving special education and related services; and

(2) The number of handicapped children:

(i) Who are receiving a free appropriate public education,

(ii) Who need, but are not receiving a free appropriate public education,

(iii) Who are enrolled in public and private institutions who are receiving a free appropriate public education, and

(iv) Who are enrolled in public and private institutions and are not receiving a free appropriate public education.

(c) The estimated numbers of handicapped children who are expected to receive special education and related services during the next school year.

(d) A description of the basis used to determine the data required under this section.

(e) The data required by paragraphs (a), (b), and (c) of this section must be provided:

(1) For each disability category (except for children aged birth through two), and

(2) For each of the following age ranges: birth through two, three through five, six through seventeen, and eighteen through twenty-one.

(20 U.S.C. 1412(2)(A).)

Comment. In Part B of the Act, the term "disability" is used interchangeably with "handicapping condition". For consistency in this regulation, a child with a "disability" means a child with one of the impairments listed in the definition of "handicapped children" in § 121a.5, if the child needs special education because of the impairment. In essence, there is a continuum of impairments. When an impairment is of such a nature that the child needs special education, it is referred to as a disability, in these regulations, and the child is a "handicapped" child.

States should note that data required under this section are not to be transmitted to the Commissioner in personally identifiable form. Generally, except for such purposes as monitoring and auditing, neither the States nor the Federal Government should have to collect data under this part in personally identifiable form.

§ 121a.125 Full educational opportunity goal—timetable.

(a) *General requirement.* Each annual program plan must contain a detailed timetable for accomplishing the goal of providing full educational opportunity for all handicapped children.

(b) *Content of timetable.* (1) The timetable must indicate what percent of the total estimated number of handicapped children the State expects to have full educational opportunity in each succeeding school year.

(2) The data required under this paragraph must be provided:

(i) For each disability category (except for children aged birth through two), and

(ii) For each of the following age ranges: birth through two, three through five, six through seventeen, and eighteen through twenty-one.

(20 U.S.C. 1412(2)(A).)

§ 121a.126 Full educational opportunity goal—facilities, personnel, and services.

(a) *General requirement.* Each annual program plan must include a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet the goal of providing full educational opportunity for all handicapped children. The State educational agency shall include the data required under paragraph (b) of this section and whatever additional data are necessary to meet the requirement.

(b) *Statistical description.* Each annual program plan must include the following data:

(1) The number of additional special class teachers, resource room teachers, and itinerant or consultant teachers needed for each disability category and

the number of each of these who are currently employed in the State.

(2) The number of other additional personnel needed, and the number currently employed in the State, including school psychologists, school social workers, occupational therapists, physical therapists, home-hospital teachers, speech-language pathologists, audiologists, teacher aides, vocational education teachers, work study coordinators, physical education teachers, therapeutic recreation specialists, diagnostic personnel, supervisors, and other instructional and non-instructional staff.

(3) The total number of personnel reported under paragraph (b) (1) and (2) of this section, and the salary costs of those personnel.

(4) The number and kind of facilities needed for handicapped children and the number and kind currently in use in the State, including regular classes serving handicapped children, self-contained classes on a regular school campus, resource rooms, private special education day schools, public special education day schools, private special education residential schools, public special education residential schools, hospital programs, occupational therapy facilities, physical therapy facilities, public sheltered workshops, private sheltered workshops, and other types of facilities.

(5) The total number of transportation units needed for handicapped children, the number of transportation units designed for handicapped children which are in use in the State, and the number of handicapped children who use these units to benefit from special education.

(c) *Data categories.* The data required under paragraph (b) of this section must be provided as follows:

(1) Estimates for serving all handicapped children who require special education and related services,

(2) Current year data, based on the actual numbers of handicapped children receiving special education and related services (as reported under Subpart G), and

(3) Estimates for the next school year.

(d) *Rationale.* Each annual program plan must include a description of the means used to determine the number and salary costs of personnel.

(20 U.S.C. 1412(2)(A).)

§ 121a.127 Priorities.

(a) *General requirement.* Each annual program plan must include information which shows that:

(1) The State has established priorities which meet the requirements under §§ 121a.320–121a.324 of Subpart C.

(2) The State priorities meet the timelines under § 121a.122 of this subpart, and

(3) The State has made progress in meeting those timelines.

(b) *Child data.* (1) Each annual program plan must show the number of handicapped children known by the State to be in each of the first two priority groups named in §§ 121a.321 of Subpart C:

(i) By disability category, and

(2) By the age ranges in § 121a.124(e)(2) of this subpart.

(c) *Activities and resources.* Each annual program plan must show for each of the first two priority groups:

(1) The programs, services, and activities that are being carried out in the State,

(2) The Federal, State, and local resources that have been committed during the current school year, and

(3) The programs, services, activities, and resources that are to be provided during the next school year.

(20 U.S.C. 1412(3).)

§ 121a.128 Identification, location, and evaluation of handicapped children.

(a) *General requirement.* Each annual program plan must include in detail the policies and procedures which the State will undertake or has undertaken to insure that:

(1) All children who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated; and

(2) A practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services.

(b) *Information.* Each annual program plan must:

(1) Designate the State agency (if other than the State educational agency) responsible for coordinating the planning and implementation of the policies and procedures under paragraph (a) of this section;

(2) Name each agency that participates in the planning and implementation and describe the nature and extent of its participation;

(3) Describe the extent to which:

(i) The activities described in paragraph (a) of this section have been achieved under the current annual program plan, and

(ii) The resources named for these activities in that plan have been used;

(4) Describe each type of activity to be carried out during the next school year, including the role of the agency named under paragraph (b)(1) of this section, timelines for completing those activities, resources that will be used, and expected outcomes;

(5) Describe how the policies and procedures under paragraph (a) of this section will be monitored to insure that the State educational agency obtains:

(i) The number of handicapped children within each disability category that have been identified, located, and evaluated, and

(ii) Information adequate to evaluate the effectiveness of those policies and procedures; and

(6) Describe the method the State uses to determine which children are currently receiving special education and related services and which children are not receiving special education and related services.

(20 U.S.C. 1412(2)(C).)

Comment. The State is responsible for insuring that all handicapped children are identified, located, and evaluated, including children in all public and private agencies and institutions in the State. Collection and use of data are subject to the confidentiality requirements in §§ 121a.560–121a.576.

§ 121a.129 Confidentiality of personally identifiable information.

(a) Each annual program plan must include in detail the policies and procedures which the State will undertake or has undertaken in order to insure the protection of the confidentiality of any personally identifiable information collected, used, or maintained under this part.

(b) The Commissioner shall use the criteria in §§ 121a.560–121a.576 of Subpart E to evaluate the policies and procedures of the State under paragraph (a) of this section.

(20 U.S.C. 1412(2)(D); 1417(c).)

Comment. The confidentiality regulations were published in the FEDERAL REGISTER in final form on February 27, 1976 (41 FR 8603–8610), and met the requirements of Part B of the Act, as amended by Pub. L. 94–142. Those regulations are incorporated in § 121a.560–121a.578 of Subpart E.

§ 121a.130 Individualized education programs.

(a) Each annual program plan must include information which shows that each public agency in the State maintains records of the individualized education program for each handicapped child, and each public agency establishes, reviews, and revises each program as provided in Subpart C.

(b) Each annual program plan must include:

(1) A copy of each State statute, policy, and standard that regulates the manner in which individualized education programs are developed, implemented, reviewed, and revised, and

(2) The procedures which the State educational agency follows in monitoring and evaluating those programs.

(20 U.S.C. 1412(4).)

§ 121a.131 Procedural safeguards.

Each annual program plan must include procedural safeguards which insure that the requirements in §§ 121a.500–121a.514 of Subpart E are met.

(20 U.S.C. 1412(5)(A).)

§ 121a.132 Least restrictive environment.

(a) Each annual program plan must include procedures which insure that the requirements in §§ 121a.550–121a.556 of Subpart E are met.

(b) Each annual program plan must include the following information:

(1) The number of handicapped children in the State, within each disability category, who are participating in regular education programs, consistent with §§ 121a.550–121a.556 of Subpart E.

(2) The number of handicapped children who are in separate classes or separate school facilities, or who are otherwise removed from the regular education environment.

(20 U.S.C. 1412(5)(B).)

§ 121a.133 Protection in evaluation procedures.

Each annual program plan must include procedures which insure that the requirements in §§ 121a.530–121a.534 of Subpart E are met.

(10 U.S.C. 1412(5)(C).)

§ 121a.134 Responsibility of State educational agency for all educational programs.

(a) Each annual program plan must include information which shows that the requirements in § 121a.600 of Subpart F are met.

(b) The information under paragraph (a) of this section must include a copy of each State statute, State regulation, signed agreement between respective agency officials, and any other document that shows compliance with that paragraph.

(20 U.S.C. 1412(6).)

§ 121a.135 Monitoring procedures.

Each annual program plan must include information which shows that the requirements in § 121a.601 and § 121a.602 of Subpart F are met.

(20 U.S.C. 1412(6).)

§ 121a.136 Implementation procedures—State educational agency.

Each annual program plan must describe the procedures the State educational agency follows to inform each public agency of its responsibility for insuring effective implementation of procedural safeguards for the handicapped children served by that public agency.

(20 U.S.C. 1412(6).)

§ 121a.137 Procedures for consultation.

Each annual program plan must include an assurance that in carrying out the requirements of section 612 of the Act, procedures are established for consultation with individuals involved in or concerned with the education of handicapped children, including handicapped individuals and parents of handicapped children.

(20 U.S.C. 1412(7)(A).)

§ 121a.138 Other Federal programs.

Each annual program plan must provide that programs and procedures are established to insure that funds received by the State or any public agency in the State under any other Federal program, including section 121 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 241e–2), section 305(b)(8) of that Act (20 U.S.C. 844a(b)(8)) or Title IV–C of that Act (20 U.S.C. 1831), and section 110(a) of the Vocational Education Act of 1963, under which there is specific authority for assistance for the education of handicapped children, are used by the State, or any public agency in the State, only in a manner consistent with the goal of providing free appropriate public education for all handicapped children, except that nothing in this section limits the specific requirements of the laws governing those Federal programs.

(20 U.S.C. 1413(a)(2).)

§ 121a.139 Comprehensive system of personnel development.

Each annual program plan must include the material required under §§ 121a.380–121a.387 of Subpart C.

(20 U.S.C. 1413(a)(3).)

§ 121a.140 Private schools.

Each annual program plan must include policies and procedures which insure that the requirements of Subpart D are met.

(20 U.S.C. 1413(a)(4).)

§ 121a.141 Recovery of funds for misclassified children.

Each annual program plan must include policies and procedures which insure that the State seeks to recover any funds provided under Part B of the Act for services to a child who is determined to be erroneously classified as eligible to be counted under section 611(a) or (d) of the Act.

(20 U.S.C. 1413(a)(5).)

§ 121a.142 Control of funds and property.

Each annual program plan must provide assurance satisfactory to the Commissioner that the control of funds provided under Part B of the Act, and title to property acquired with those funds, is in a public agency for the uses and purposes provided in this part, and that a public agency administers the funds and property.

(20 U.S.C. 1413(a)(6).)

§ 121a.143 Records.

Each annual program plan must provide for keeping records and affording access to those records, as the Commissioner may find necessary to assure the correctness and verification of reports and of proper disbursement of funds provided under Part B of the Act.

(20 U.S.C. 1413(a)(7)(B).)

§ 121a.144 Hearing on application.

Each annual program plan must include procedures to insure that the State educational agency does not take any final action with respect to an application submitted by a local educational agency before giving the local educational agency reasonable notice and an opportunity for a hearing.

(20 U.S.C. 1413(a)(8).)

§ 121a.145 Prohibition of commingling.

Each annual program plan must provide assurance satisfactory to the Commissioner that funds provided under Part B of the Act are not commingled with State funds.

(20 U.S.C. 1413(a)(9).)

Comment. This assurance is satisfied by the use of a separate accounting system that includes an "audit trail" of the expenditure of the Part B funds. Separate bank accounts are not required. (See 45 CFR 100b, Subpart F (Cash Depositories).)

§ 121a.146 Annual evaluation.

Each annual program plan must include procedures for evaluation at least annually of the effectiveness of programs in meeting the educational needs of handicapped children, including evaluation of individualized education programs.

(20 U.S.C. 1413(a)(11).)

§ 121a.147 State advisory panel.

Each annual program plan must provide that the requirements of §§ 121a.650–121a.653 of Subpart F are met.

(20 U.S.C. 1413(a)(12).)

§ 121a.148 Policies and procedures for use of Part B funds.

Each annual program plan must set forth policies and procedures designed to insure that funds paid to the State under Part B of the Act are spent in accordance with the provisions of Part B, with particular attention given to sections 611(b), 611(c), 611(d), 612(2), and 612(3) of the Act.

(20 U.S.C. 1413(a)(1).)

§ 121a.149 Description of use of Part B funds.

(a) *State allocation.* Each annual program plan must include the following information about the State's use of funds under § 121a.370 of Subpart C and § 121a.620 of Subpart F:

(1) A list of administrative positions, and a description of duties for each person whose salary is paid in whole or in part with those funds.

(2) For each position, the percentage of salary paid with those funds.

(3) A description of each administrative activity the State educational agency will carry out during the next school year with those funds.

(4) A description of each direct service and each support service which the State educational agency will provide during the next school year with those funds, and the activities the State advisory panel will undertake during that period with those funds.

(b) *Local educational agency allocation.* Each annual program plan must include:

(1) An estimate of the number and percent of local educational agencies in the State which will receive an allocation under this part (other than local educational agencies which submit a consolidated application),

(2) An estimate of the number of local educational agencies which will receive an allocation under a consolidated application,

(3) An estimate of the number of consolidated applications and the average number of local educational agencies per application, and

(4) A description of direct services the State educational agency will provide under § 121a.360 of Subpart C.

(20 U.S.C. 1232c(b)(1)(B)(ii).)

§ 121a.150 Nondiscrimination and employment of handicapped individuals.

(a) Each annual program plan must include an assurance that the program assisted under Part B of the Act will be operated in compliance with Title 45 of the Code of Federal Regulations Part 84 (Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance). The State educational agency may incorporate this assurance by reference if it has already been filed with the Department of Health, Education, and Welfare.

(b) The assurance under paragraph (a) of this section covers, among other things, the specific requirement on employment of handicapped individuals under section 606 of the Act, which states:

> The Secretary shall assure that each recipient of assistance under this Act shall make positive efforts to employ and advance in employment qualified handicapped individuals in programs assisted under this Act.

(20 U.S.C. 1405; 29 U.S.C. 794.)

§ 121a.151 Additional information if the State educational agency provides direct services.

If a State educational agency provides free appropriate public education for handicapped children or provides them with direct services, its annual program plan must include the information required under §§ 121a.226–121a.228, 121a.231, and 121a.235.

(20 U.S.C. 1413(b).)

LOCAL EDUCATIONAL AGENCY APPLICATIONS—GENERAL

§ 121a.180 Submission of application.

In order to receive payments under Part B of the Act for any fiscal year a local educational agency must submit an application to the State educational agency.

(20 U.S.C. 1414(a).)

§ 121a.181 Responsibilities of State educational agency.

Each State educational agency shall establish the procedures and format which a local educational agency uses in preparing and submitting its application.

(20 U.S.C. 1414(a))

§ 121a.182 The excess cost requirement.

A local educational agency may only use funds under Part B of the Act for the excess costs of providing special education and related services for handicapped children.

(20 U.S.C. 1414(a)(1), (a)(2)(B)(i).)

§ 121a.183 Meeting the excess cost requirement.

(a) A local educational agency meets the excess cost requirement if it has on the average spent at least the amount determined under § 121a.184 for the education of each of its handicapped children. This amount may not include capital outlay or debt service.

(b) Each local educational agency must keep records adequate to show that it has met the excess cost requirement.

(20 U.S.C. 1402(20); 1414(a)(1).)

Comment. The excess cost requirement means that the local educational agency must spend a certain minimum amount for the education of its handicapped children before Part B funds are used. This insures that children served with Part B funds have at least the same average amount spent on them, from sources other than Part B, as do the children in the school district taken as a whole.

The minimum amount that must be spent for the education of handicapped children is computed under a statutory formula. Section 121a.184 implements this formula and gives a step-by-step method to determine the minimum amount. Excess costs are those costs of special education and related services which exceed the minimum amount. Therefore, if a local educational agency can show that it has (on the average) spent the minimum amount for the education of each of its handicapped children, it has met the excess cost requirement, and all additional costs are excess costs. Part B funds can then be used to pay for these additional costs, subject to the other requirements of Part B (priorities, etc.). In the "Comment" under section 121a.184, there is an example of how the minimum amount is computed.

§ 121a.184 Excess costs—computation of minimum amount.

The minimum average amount a local educational agency must spend under § 121a.183 for the education of each of its handicapped children is computed as follows:

(a) Add all expenditures of the local educational agency in the preceding school year, except capital outlay and debt service:

(1) For elementary school students, if the handicapped child is an elementary school student, or

(2) For secondary school students, if the handicapped child is a secondary school student.

(b) From this amount, subtract the total of the following amounts spent for elementary school students or for secondary school students, as the case may be:

(1) Amounts the agency spent in the preceding school year from funds awarded under Part B of the Act and Titles I and VII of the Elementary and Secondary Education Act of 1965, and

(2) Amounts from State and local funds which the agency spent in the preceding school year for:

(i) Programs for handicapped children,

(ii) Programs to meet the special educational needs of educationally deprived children, and

(iii) Programs of bilingual education for children with limited English-speaking ability.

(c) Divide the result under paragraph (b) of this section by the average number of students enrolled in the agency in the preceding school year:

(1) In its elementary schools, if the handicapped child is an elementary school student, or

(2) In its secondary schools, if the handicapped child is a secondary school student.

(20 U.S.C. 1414(a)(1).)

Comment. The following is an example of how a local educational agency might compute the average minimum amount it must spend for the education of each of its handicapped children, under § 121a.183. This example follows the formula in § 121a.184. Under the statute and regulations, the local educational agency must make one computation for handicapped children in its elementary schools and a separate computation for handicapped children in its secondary schools. The computation for handicapped elementary school students would be done as follows:

a. First, the local educational agency must determine its total amount of expenditures for elementary school students from all sources—local, State, and Federal (including Part B)—in the preceding school year. Only capital outlay and debt service are excluded.

Example: A local educational agency spent the following amounts last year for elementary school students (including its handicapped elementary school students):

(1) From local tax funds	$2,750,000
(2) From State funds	7,000,000
(3) From Federal funds	750,000
	10,500,000

Of this total, $500,000 was for capital outlay and debt service relating to the education of elementary school students. This must be subtracted from total expenditures:

	$10,500,000
	- 500,000
Total expenditures for elementary school students (less capital outlay and debt service)	= 10,000,000

b. Next, the local educational agency must subtract amounts spent for:

(1) Programs for handicapped children;

(2) Programs to meet the special educational needs of educationally deprived children; and

(3) Programs of bilingual education for children with limited English-speaking ability.

These are funds which the local educational agency actually spent, not funds received last year but carried over for the current school year.

Example: The local educational agency spent the following amounts for elementary school students last year:

(1) From funds under Title I of the Elementary and Secondary Education Act of 1965	$300,000
(2) From a special State program for educationally deprived children	200,000
(3) From a grant under Part B	200,000
(4) From State funds for the education of handicapped children	500,000

(5) From a locally-funded program for handicapped children	$250,000
(6) From a grant for a bilingual education program under Title VII of the Elementary and Secondary Education Act of 1965	150,000
Total	1,600,000

(A local educational agency would also include any other funds it spent from Federal, State, or local sources for the three basic purposes: handicapped children, educationally deprived children, and bilingual education for children with limited English-speaking ability.)

This amount is subtracted from the local educational agency's total expenditure for elementary school students computed above:

$10,000,000
—1,600,000
8,400,000

c. The local educational agency next must divide by the average number of students enrolled in the elementary schools of the agency last year (including its handicapped students).

Example: Last year, an average of 7,000 students were enrolled in the agency's elementary schools. This must be divided into the amount computed under the above paragraph:

$8,400,000
7,000 students
=$1,200/student

This figure is in the minimum amount the local educational agency must spend (on the average) for the education of each of its handicapped students. Funds under Part B may be used only for costs over and above this minimum. In this example, if the local educational agency has 100 handicapped elementary school students, it must keep records adequate to show that it has spent at least $120,000 for the education of those students (100 students times $1,200/student), not including capital outlay and debt service.

This $120,000 may come from any funds except funds under Part B, subject to any legal requirements that govern the use of those other funds.

If the local educational agency has handicapped secondary school students, it must do the same computation for them. However, the amounts used in the computation would be those the local educational agency spent last year for the education of secondary school students, rather than for elementary school students.

§ 121a.185 Computation of excess costs—consolidated application.

The minimum average amount under § 121a.183 where two or more local educational agencies submit a consolidated application, is the average of the combined minimum average amounts determined under § 121a.184 in those agencies for elementary or secondary school students, as the case may be.

(20 U.S.C. 1414(a)(1).)

§ 121a.186 Excess costs—limitation on use of Part B funds.

(a) The excess cost requirement prevents a local educational agency from using funds provided under Part B of the Act to pay for all of the costs directly attributable to the education of a handicapped child, subject to paragraph (b) of this section.

(b) The excess cost requirement does not prevent a local educational agency from using Part B funds to pay for all of the costs directly attributable to the education of a handicapped child in any of the age ranges three, four, five, eighteen, nineteen, twenty, or twenty-one, if no local or State funds are available for non-handicapped children in that age range. However, the local educational agency must comply with the nonsupplanting and other requirements of this part in providing the education and services.

(20 U.S.C. 1402(20); 1414(a)(1).)

§ 121a.190 Consolidated applications.

(a) *Voluntary applications.* Local educational agencies may submit a consolidated application for payments under Part B of the Act.

(b) *Required applications.* A State educational agency may require local educational agencies to submit a consolidated application for payments under Part B of the Act if the State educational agency determines that an individual application submitted by a local educational agency will be disapproved because:

(1) The agency's entitlement is less than the $7,500 minimum required by section 611(c)(4)(A)(i) of the Act (§ 121a.360(a)(1) of Subpart C); or

(2) The agency is unable to establish and maintain programs of sufficient size and scope to effectively meet the educational needs of handicapped children.

(c) *Size and scope of program.* The State educational agency shall establish standards and procedures for determinations under paragraph (b)(2) of this section.

(20 U.S.C. 1414(c)(1).)

§ 121a.191 Payments under consolidated applications.

In any case in which a consolidated application is approved by the State educational agency, the payments to the participating local educational agencies must be equal to the sum of the entitlements of the separate local educational agencies.

(20 U.S.C. 1414(c)(2)(A).)

§ 121a.192 State regulation of consolidated applications.

(a) The State educational agency shall issue regulations with respect to consolidated applications submitted under this part.

(b) The State educational agency's regulations must:

(1) Be consistent with section 612(1)–(7) and section 613(a) of the Act, and

(2) Provide participating local educational agencies with joint responsibilities for implementing programs receiving payments under this part.

(20 U.S.C. 1414(c)(2)(B).)

(c) If an intermediate educational unit is required under State law to carry out this part, the joint responsibilities given to local educational agencies under paragraph (b)(2) of this section do not apply to the administration and disbursement of any payments received by the intermediate educational unit. Those administrative responsibilities must be carried out exclusively by the intermediate educational unit.

(20 U.S.C. 1414(c)(2)(C).)

§ 121a.193 State educational agency approval; disapproval.

(a) *Approval.* A State educational agency shall approve an application submitted by a local educational agency if the State educational agency determines that the application meets the requirements under §§ 121a.220–121a.240. However, the State educational agency may not approve any application until the Commissioner approves its annual program plan for the school year covered by the application.

(b) *Disapproval.* The State educational agency shall disapprove an application if the State educational agency determines that the application does not meet a requirement under §§ 121a.220–121a.240.

(20 U.S.C. 1414(b)(1).)

(c) In carrying out its functions under this section, each State educational agency shall consider any decision resulting from a hearing under §§ 121a.506–121a.513 of Subpart E which is adverse to the local educational agency involved in the decision.

(20 U.S.C. 1414(b)(3).)

§ 121a.194 Withholding.

(a) If a State educational agency, after giving reasonable notice and an opportunity for a hearing to a local educational agency, decides that the local educational agency in the administration of an application approved by the State educational agency has failed to comply with any requirement in the application, the State educational agency, after giving notice to the local educational agency, shall:

(1) Make no further payments to the local educational agency until the State educational agency is satisfied that there is no longer any failure to comply with the requirement; or

(2) Consider its decision in its review of any application made by the local educational agency under § 121a.180;

(3) Or both.

(b) Any local educational agency receiving a notice from a State educational agency under paragraph (a) of this section is subject to the public notice provision in § 121a.592.

(20 U.S.C. 1414(b)(2).)

LOCAL EDUCATIONAL AGENCY APPLICATIONS—CONTENTS

§ 121a.220 Child identification.

Each application must include procedures which insure that all children residing within the jurisdiction of the local educational agency who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated, including a practical method of determining which children are currently receiving needed

special education and related services and which children are not currently receiving needed special education and related services.

(20 U.S.C. 1414(a)(1)(A).)

Comment. The local educational agency is responsible for insuring that all handicapped children within its jurisdiction are identified, located, and evaluated, including children in all public and private agencies and institutions within that jurisdiction. Collection and use of data are subject to the confidentiality requirements in §§ 121a.560–121a.576 of Subpart E.

§ 121a.221 Confidentiality of personally identifiable information.

Each application must include policies and procedures which insure that the criteria in §§ 121a.560–121a.574 of Subpart E are met.

(20 U.S.C. 1414(a)(1)(B).)

§ 121a.222 Full educational opportunity goal; timetable.

Each application must: (a) Include a goal of providing full educational opportunity to all handicapped children, aged birth through 21, and

(b) Include a detailed timetable for accomplishing the goal.

(20 U.S.C. 1414(a)(1)(C), (D).)

§ 121a.223 Facilities, personnel, and services.

Each application must provide a description of the kind and number of facilities, personnel, and services necessary to meet the goal in § 121a.222.

(20 U.S.C. 1414(a)(1)(E).)

§ 121a.224 Personnel development.

Each application must include procedures for the implementation and use of the comprehensive system of personnel development established by the State educational agency under § 121a.140.

(20 U.S.C. 1414(a)(1)(C)(i).)

§ 121a.225 Priorities.

Each application must include priorities which meet the requirements of §§ 121a.320–121a.324.

(20 U.S.C. 1414(a)(1)(C)(ii).)

§ 121a.226 Parent involvement.

Each application must include procedures to insure that, in meeting the goal under § 121a.222, the local educational agency makes provision for participation of and consultation with parents or guardians of handicapped children.

(20 U.S.C. 1414(a)(1)(C)(iii).)

§ 121a.227 Participation in regular education programs.

(a) Each application must include procedures to insure that to the maximum extent practicable, and consistent with §§ 121a.550–121a.553 of Subpart E, the local educational agency provides special services to enable handicapped children to participate in regular educational programs.

(b) Each application must describe:

(1) The types of alternative placements that are available for handicapped children, and

(2) The number of handicapped children within each disability category who are served in each type of placement.

(20 U.S.C. 1414(a)(1)(C)(iv).)

§ 121a.228 Public control of funds.

Each application must provide assurance satisfactory to the State educational agency that control of funds provided under Part B of the Act and title to property acquired with those funds, is in a public agency for the uses and purposes under this part, and that a public agency administers the funds and property.

(20 U.S.C. 1414(a)(2)(A).)

§ 121a.229 Excess cost.

Each application must provide assurance satisfactory to the State educational agency that the local educational agency uses funds provided under Part B of the Act only for costs which exceed the amount computed under § 121a.184 and which are directly attributable to the education of handicapped children.

(20 U.S.C. 1414(a)(2)(B).)

§ 121a.230 Nonsupplanting.

(a) Each application must provide assurance satisfactory to the State educational agency that the local educational agency uses funds provided under Part B of the Act to supplement and, to the extent practicable, increase the level of State and local funds expended for the education of handicapped children, and in no case to supplant those State and local funds.

(b) To meet the requirement in paragraph (a) of this section:

(1) The total amount or average per capita amount of State and local school funds budgeted by the local educational agency for expenditures in the current fiscal year for the education of handicapped children must be at least equal to the total amount or average per capita amount of State and local school funds actually expended for the education of handicapped children in the most recent preceding fiscal year for which the information is available. Allowance may be made for:

(i) Decreases in enrollment of handicapped children; and

(ii) Unusually large amounts of funds expended for such long-term purposes as the acquisition of equipment and the construction of school facilities; and

(2) The local educational agency must not use Part B funds to displace State or local funds for any particular cost.

(20 U.S.C. 1414(a)(2)(B).)

Comment. Under statutes such as Title I of the Elementary and Secondary Education Act of 1965, as amended, the requirement is to not supplant funds that "would" have been expended if the Federal funds were not available. The requirement under Part B, however, is to not supplant funds which have been "expended." This use of the past tense suggests that the funds referred to are those which the State or local agency actually spent at some time before the use of the Part B funds. Therefore, in judging compliance with this requirement, the Commissioner looks to see if Part B funds are used for any costs which were previously paid for with State or local funds.

The nonsupplanting requirement prohibits a local educational agency from supplanting State and local funds with Part B funds on either an aggregate basis or for a given expenditure. This means that if an LEA spent $100,000 for special education in FY 1977, it must budget at least $100,000 in FY 1978, unless one of the conditions in § 121a.230(b)(1) applies.

Whether a local educational agency supplants with respect to a particular cost would depend on the circumstances of the expenditure. For example, if a teacher's salary has been switched from local funding to Part B funding, this would appear to be supplanting. However, if that teacher was taking over a different position (such as a resource room teacher, for example), it would not be supplanting. Moreover, it might be important to consider whether the particular action of a local educational agency led to an increase in services for handicapped children over that which previously existed. The intent of the requirement is to insure that Part B funds are used to increase State and local efforts and are not used to take their place. Compliance would be judged with this aim in mind. The supplanting requirement is not intended to inhibit better services to handicapped children.

§ 121a.231 Comparable services.

(a) Each application must provide assurance satisfactory to the State educational agency that the local educational agency meets the requirements of this section.

(b) A local educational agency may not use funds under Part B of the Act to provide services to handicapped children unless the agency uses State and local funds to provide services to those children which, taken as a whole, are at least comparable to services provided to other handicapped children in that local educational agency.

(c) Each local educational agency shall maintain records which show that the agency meets the requirement in paragraph (b) of this section.

(20 U.S.C. 1414(a)(2)(C).)

Comment. Under the "comparability" requirement, if State and local funds are used to provide certain services, those services must be provided with State and local funds to all handicapped children in the local educational agency who need them. Part B funds may then be used to supplement existing services, or to provide additional services to meet special needs. This, of course, is subject to the other requirements of the Act, including the priorities under §§ 121a.320–121a.324.

§ 121a.232 Information—reports.

Each application must provide that the local educational agency furnishes information (which, in the case of reports relating to performance, is in accordance with specific performance criteria developed by the local educational agency and related to program objectives) as may be necessary to enable the State educational

agency to perform its duties under this part, including information relating to the educational achievement of handicapped children participating in the local educational agency's programs for handicapped children.

(20 U.S.C. 1414(a)(3)(A).)

§ 121a.233 Records.

Each application must provide that the local educational agency keeps such records, and affords access to those records, as the State educational agency may find necessary to insure the correctness and verification of the information that the local educational agency furnishes under § 121a.232.

(20 U.S.C. 1414(a)(3)(B).)

§ 121a.234 Public participation.

(a) Each application must:

(1) Provide for making the application and all documents related to the application available to parents and the general public; and

(2) Provide that all evaluations and reports required under § 121a.232 are public information.

(b) In implementing the requirement in paragraph (a)(1), the local educational agency shall use methods for public participation within its jurisdiction which are comparable to those required in § 121a.280–121a.284 of this subpart. However, the local educational agency is not required to hold public hearings.

(20 U.S.C. 1414(a)(4).)

§ 121a.235 Individualized education program.

Each application must include procedures to assure that the local educational agency complies with §§ 121a.340–121a.349 of Subpart C.

(20 U.S.C. 1414(a)(5).)

§ 121a.236 Local policies consistent with statute.

Each application must provide assurance satisfactory to the State educational agency that all policies and programs which the local educational agency establishes and administers are consistent with section 612(1)–(7) and section 613(a) of the Act.

(20 U.S.C. 1414(a)(6).)

§ 121a.237 Procedural safeguards.

Each application must provide assurance satisfactory to the State educational agency that the local educational agency has procedural safeguards which meet the requirements of §§ 121a.500–121a.514 of Subpart E.

(20 U.S.C. 1414(a)(7).)

§ 121a.238 Use of Part B funds.

Each application must describe how the local educational agency will use the funds under Part B of the Act during the next school year.

(20 U.S.C. 1414(a).)

§ 121a.239 Nondiscrimination and employment of handicapped individuals.

(a) Each application must include an assurance that the program assisted under Part B of the Act will be operated in compliance with Title 45 of the Code of Federal Regulations Part 84 (Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefitting from Federal Financial Assistance). The local educational agency may incorporate this assurance by reference if it has already been filed with the Department of Health, Education, and Welfare.

(b) The assurance under paragraph (a) of this section covers, among other things, the specific requirement on employment of handicapped individuals under section 606 of the Act, which states:

> The Secretary shall assure that each recipient of assistance under this Act shall make positive efforts to employ and advance in employment qualified handicapped individuals in programs assisted under this Act.

(20 U.S.C. 1405; 29 U.S.C. 794.)

§ 121a.240 Other requirements.

Each local application must include additional procedures and information which the State educational agency may require in order to meet the State annual program plan requirements under §§ 121a.120–121a.151.

(20 U.S.C. 1414(a)(6).)

APPLICATION FROM SECERTARY OF INTERIOR

§ 121a.260 Submission of annual application; approval.

In order to receive payments under this part, the Secretary of Interior shall submit an annual application which:

(a) Meets applicable requirements of section 614(a) of the Act;

(b) Includes monitoring procedures which are consistent with § 121a.691; and

(c) Includes other material as agreed to by the Commissioner and the Secretary of Interior.

(20 U.S.C. 1411(f).)

§ 121a.261 Public participation.

In the development of the application for the Department of Interior, the Secretary of Interior shall provide for public participation consistent with §§ 121a.280–121a.284.

(20 U.S.C. 1411(f).)

§ 121a.262 Use of Part B funds.

(a) The Department of Interior may use five percent of its payments in any fiscal year, or $200,000, whichever is greater, for administrative costs in carrying out the provisions of this Part.

(b) The remainder of the payments to the Secretary of Interior in any fiscal year must be used in accordance with the priorities under §§ 121a.320–121a.324 of Subpart C.

(20 U.S.C. 1411(f).)

§ 121a.263 Applicable regulations.

The Secretary of Interior shall comply with the requirements under Subparts C, E, and F.

(20 U.S.C. 1411(f)(2).)

PUBLIC PARTICIPATION

§ 121a.280 Public hearings before adopting an annual program plan.

(a) Prior to its adoption of an annual program plan, the State educational agency shall:

(1) Make the plan available to the general public,

(2) Hold public hearings, and

(3) Provide an opportunity for comment by the general public on the plan.

(20 U.S.C. 1412(7).)

§ 121a.281 Notice.

(a) The State educational agency shall provide notice to the general public of the public hearings.

(b) The notice must be in sufficient detail to inform the public about:

(1) The purpose and scope of the annual program plan and its relation to Part B of the Education of the Handicapped Act,

(2) The availability of the annual program plan,

(3) The date, time, and location of each public hearing,

(4) The procedures for submitting written comments about the plan, and

(5) The timetable for developing the final plan and submitting it to the Commissioner for approval.

(c) The notice must be published or announced:

(1) In newspapers or other media, or both, with circulation adequate to notify the general public about the hearings, and (2) Enough in advance of the date of the hearings to afford interested parties throughout the State a reasonable opportunity to participate.

(20 U.S.C. 1412(7).)

§ 121a.282 Opportunity to participate; comment period.

(a) The State educational agency shall conduct the public hearings at times and places that afford interested parties throughout the State a reasonable opportunity to participate.

(b) The plan must be available for comment for a period of at least 30 days following the date of the notice under § 121a.281.

(20 U.S.C. 1412(7).)

§ 121a.283 Review of public comments before adopting plan.

Before adopting its annual program plan, the State educational agency shall:

(a) Review and consider all public comments, and

(b) Make any necessary modifications in the plan.

(20 U.S.C. 1412(7).)

§ 121a.284 Publication and availability of approved plan.

After the Commissioner approves an annual program plan, the State educational agency shall give notice in newspapers or other media, or both, that the plan is approved. The notice must name places throughout the State where the plan is available for access by any interested person.

(20 U.S.C. 1412(7).)

Subpart C—Services

FREE APPROPRIATE PUBLIC EDUCATION

§ 121a.300 Timelines for free appropriate public education.

(a) *General.* Each State shall insure that free appropriate public education is available to all handicapped children aged three through eighteen within the State not later than September 1, 1978, and to all handicapped children aged three through twenty-one within the State not later than September 1, 1980.

(b) *Age ranges 3–5 and 18–21.* This paragraph provides rules for applying the requirement in paragraph (a) of this section to handicapped children aged three, four, five, eighteen, nineteen, twenty, and twenty-one:

(1) If State law or a court order requires the State to provide education for handicapped children in any disability category in any of these age groups, the State must make a free appropriate public education available to all handicapped children of the same age who have that disability.

(2) If a public agency provides education to non-handicapped children in any of these age groups, it must make a free appropriate public education available to at least a proportionate number of handicapped children of the same age.

(3) If a public agency provides education to 50 percent or more of its handicapped children in any disability category in any of these age groups, it must make a free appropriate public education available to all of its handicapped children of the same age who have that disability.

(4) If a public agency provides education to a handicapped child in any of these age groups, it must make a free appropriate public education available to that child and provide that child and his or her parents all of the rights under Part B of the Act and this part.

(5) A State is not required to make a free appropriate public education available to a handicapped child in one of these age groups if:

(i) State law expressly prohibits, or does not authorize, the expenditure of public funds to provide education to non-handicapped children in that age group; or

(ii) The requirement is inconsistent with a court order which governs the provision of free public education to handicapped children in that State.

(20 U.S.C. 1412(2)(B); Sen. Rept. No. 94–168 p. 19 (1975).)

Comment. 1. The requirement to make free appropriate public education available applies to all handicapped children within the State who are in the age ranges required under section 121a.300 and who need special education and related services. This includes handicapped children already in school and children with less severe handicaps, who are not covered under the priorities under § 121a.321.

2. In order to be in compliance with § 121a.300, each State must insure that the requirement to identify, locate, and evaluate all handicapped children is fully implemented by public agencies throughout the State. This means that before September 1, 1978, every child who has been referred or is on a waiting list for evaluation (including children in school as well as those not receiving an education) must be evaluated in accordance with §§ 121a.530–121a.533 of Subpart E. If, as a result of the evaluation, it is determined that a child needs special education and related services, an individualized education program must be developed for the child by September 1, 1978, and all other applicable requirements of this part must be met.

3. The requirement to identify, locate, and evaluate handicapped children (commonly referred to as the "child find system") was enacted on August 21, 1974, under Pub. L. 93–380. While each State needed time to establish and implement its child find system, the four year period between August 21, 1974, and September 1, 1978, is considered to be sufficient to insure that the system is fully operational and effective on a State-wide basis.

Under the statute, the age range for the child find requirement (0–21) is greater than the mandated age range for providing free appropriate public education (FAPE). One reason for the broader age requirement under "child find" is to enable States to be aware of and plan for younger children who will require special education and related services. It also ties in with the full educational opportunity goal requirement, which has the same age range as child find. Moreover, while a State is not required to provide "FAPE" to handicapped children below the age ranges mandated under § 121a.300, the State may, at its discretion, extend services to those children, subject to the requirements on priorities under §§ 121a.320–121a.324.

§ 121a.301 Free appropriate public education—methods and payments.

(a) Each State may use whatever State, local, Federal, and private sources of support are available in the State to meet the requirements of this part. For example, when it is necessary to place a handicapped child in a residential facility, a State could use joint agreements between the agencies involved for sharing the cost of that placement.

(b) Nothing in this part relieves an insurer or similar third party from an otherwise valid obligation to provide or to pay for services provided to a handicapped child.

(20 U.S.C. 1401(18); 1412(2)(B).)

§ 121a.302 Residential placement.

If placement in a public or private residential program is necessary to provide special education and related services to a handicapped child, the program, including non-medical care and room and board, must be at no cost to the parents of the child.

(20 U.S.C. 1412(2)(B); 1413(a)(4)(B).)

Comment. This requirement applies to placements which are made by public agencies for educational purposes, and includes placements in State-operated schools for the handicapped, such as a State school for the deaf or blind.

§ 121a.303 Proper functioning of hearing aids.

Each public agency shall insure that the hearing aids worn by deaf and hard of hearing children in school are functioning properly.

(20 U.S.C. 1412(2)(B).)

Comment. The report of the House of Representatives on the 1978 appropriation bill includes the following statement regarding hearing aids:

In its report on the 1976 appropriation bill the Committee expressed concern about the condition of hearing aids worn by children in public schools. A study done at the Committee's direction by the Bureau of Education for the Handicapped reveals that up to one-third of the hearing aids are malfunctioning. Obviously, the Committee expects the Office of Education will ensure that hearing impaired school children are receiving adequate professional assessment, follow-up and services.

(House Report No. 95–381, p. 67 (1977).)

§ 121a.304 Full educational opportunity goal.

(a) Each State educational agency shall insure that each public agency establishes and implements a goal of providing full educational opportunity to all handicapped children in the area served by the public agency.

(b) Subject to the priority requirements under §§ 121a.320–121a.324, a State or local educational agency may use Part B funds to provide facilities, personnel, and services necessary to meet the full educational opportunity goal.

(20 U.S.C. 1412(2)(A); 1414(a)(1)(C).)

Comment. In meeting the full educational opportunity goal, the Congress also encouraged local educational agencies to include artistic and cultural activities in programs supported under this part, subject to the priority requirements under §§ 121a.320–121a.324. This point is addressed in the following statements from the Senate Report on Pub. L. 94–142:

The use of the arts as a teaching tool for the handicapped has long been recognized as a viable, effective way not only of teaching special skills, but also of reaching youngsters who had otherwise been unteachable. The Committee envisions that programs under this bill could well include an arts component and, indeed, urges that local educational agencies include the arts in programs for the handicapped funded under this Act. Such a program could cover both appreciation of the arts by the handicapped youngsters, and the utilization of the arts as a teaching tool per se.

Museum settings have often been another effective tool in the teaching of handicapped children. For example, the Brooklyn Museum has been a leader in developing exhibits utilizing the heightened tactile sensory skill of the blind. Therefore, in light of the national policy concerning the use of museums in Federally-supported education programs enunciated in the Education Amendments of 1974, the Committee also urges local educational agencies to include museums in programs for the handicapped funded under this Act.

(Senate Report No. 94–168, p. 13 (1975).)

§ 121a.305 Program options.

Each public agency shall take steps to insure that its handicapped children have available to them the variety of educational programs and services available to non-handicapped children in the

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area served by the agency, including art, music, industrial arts, consumer and homemaking education, and vocational education.

(20 U.S.C. 1412(2)(A); 1414(a)(1)(C).)

Comment. The above list of program options is not exhaustive, and could include any program or activity in which non-handicapped students participate. Moreover, vocational education programs must be specially designed if necessary to enable a handicapped student to benefit fully from those programs; and the set-aside funds under the Vocational Education Act of 1963, as amended by Pub. L. 94-482, may be used for this purpose. Part B funds may also be used, subject to the priority requirements under §§ 121a.320-121a.324.

§ 121a.306 Nonacademic services.

(a) Each public agency shall take steps to provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped children an equal opportunity for participation in those services and activities.

(b) Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the public agency and assistance in making outside employment available.

(20 U.S.C. 1412(2)(A); 1414(a)(1)(C).)

§ 121a.307 Physical education.

(a) *General.* Physical education services, specially designed if necessary, must be made available to every handicapped child receiving a free appropriate public education.

(b) *Regular physical education.* Each handicapped child must be afforded the opportunity to participate in the regular physical education program available to non-handicapped children unless:

(1) The child is enrolled full time in a separate facility; or

(2) The child needs specially designed physical education, as prescribed in the child's individualized education program.

(c) *Special physical education.* If specially designed physical education is prescribed in a child's individualized education program, the public agency responsible for the education of that child shall provide the services directly, or make arrangements for it to be provided through other public or private programs.

(d) *Education in separate facilities.* The public agency responsible for the education of a handicapped child who is enrolled in a separate facility shall insure that the child receives appropriate physical education services in compliance with paragraphs (a) and (c) of this section.

(20 U.S.C. 1401(16); 1412(5)(B); 1414(a)(6).)

Comment. The Report of the House of Representatives on Pub. L. 94-142 includes the following statement regarding physical education:

Special education as set forth in the Committee bill includes instruction in physical education, which is provided as a matter of course to all non-handicapped children enrolled in public elementary and secondary schools. The Committee is concerned that although these services are available to and required of all children in our school systems, they are often viewed as a luxury for handicapped children.

* * * * *

The Committee expects the Commissioner of Education to take whatever action is necessary to assure that physical education services are available to all handicapped children, and has specifically included physical education within the definition of special education to make clear that the Committee expects such services, specially designed where necessary, to be provided as an integral part of the educational program of every handicapped child.

(House Report No. 94-332, p. 9 (1975).)

PRIORITIES IN THE USE OF PART B FUNDS

§ 121a.320 Definitions of "first priority children" and "second priority children."

For the purposes of §§ 121a.321-121a.324, the term:

(a) "First priority children" means handicapped children who:

(1) Are in an age group for which the State must make available free appropriate public education under § 121a.300; and

(2) Are not receiving any education.

(b) "Second priority children" means handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education.

(20 U.S.C. 1412(3).)

Comment. After September 1, 1978, there should be no second priority children, since States must insure, as a condition of receiving Part B funds for fiscal year 1979, that all handicapped children will have available a free appropriate public education by that date.

NOTE.—The term "free appropriate public education," as defined in § 121a.4 of Subpart A, means "special education and related services which * * * are provided in conformity with an individualized education program * * *."

New "First priority children" will continue to be found by the State after September 1, 1978 through on-going efforts to identify, locate, and evaluate all handicapped children.

§ 121a.321 Priorities.

(a) Each State and local educational agency shall use funds provided under Part B of the Act in the following order of priorities:

(1) To provide free appropriate public education to first priority children, including the identification, location, and evaluation of first priority children.

(2) To provide free appropriate public education to second priority children, including the identification, location, and evaluation of second priority children.

(3) To meet the other requirements in this part.

(b) The requirements of paragraph (a) of this section do not apply to funds which the State uses for administration under § 121a.620.

(20 U.S.C. 1411 (b)(1)(B), (b)(2)(B), (c)(1)(B), (c)(2)(A)(ii).

(c) State and local educational agencies may not use funds under Part B of the Act for preservice training.

(20 U.S.C. 1413(a)(3); Senate Report No. 94-168, p. 34 (1975).)

Comment. Note that a State educational agency as well as local educational agencies must use Part B funds (except the portion used for State administration) for the priorities. A State may have to set aside a portion of its Part B allotment to be able to serve newly-identified first priority children.

After September 1, 1978, Part B funds may be used:

(1) To continue supporting child identification, location, and evaluation activities;

(2) To provide free appropriate public education to newly identified first priority children;

(3) To meet the full educational opportunities goal required under section 121a.304, including employing additional personnel and providing inservice training, in order to increase the level, intensity and quality of services provided to individual handicapped children; and

(4) To meet the other requirements of Part B.

§ 121a.322 First priority children—school year 1977-1978.

(a) In school year 1977-1978, if a major component of a first priority child's proposed educational program is not available (for example, there is no qualified teacher), the public agency responsible for the child's education shall:

(1) Provide an interim program of services for the child; and

(2) Develop an individualized education program for full implementation no later than September 1, 1978.

(b) A local educational agency may use Part B funds for training or other support services in school year 1977-1978 only if all of its first priority children have available to them at least an interim program of services.

(c) A State educational agency may use Part B funds for training or other support services in school year 1977-1978 only if all first priority children in the State have available to them at least an interim program of services.

(20 U.S.C. 1411 (b), (c).)

Comment. This provision is intended to make it clear that a State or local educational agency may not delay placing a previously unserved (first priority) child until it has, for example, implemented an inservice training program. The child must be placed. After the child is in at least an interim program, the State or local educational agency may use Part B funds for training or other support services needed to provide that child with a free appropriate public education.

§ 121a.323 Services to other children.

If a State or a local educational agency is providing free appropriate public education to all of its first priority children,

that State or agency may use funds provided under Part B of the Act:

(a) To provide free appropriate public education to handicapped children who are not receiving any education and who are in the age groups not covered under § 121a.300 in that State; or

(b) To provide free appropriate public education to second priority children; or

(c) Both.

(20 U.S.C. 1411(b)(1)(B), (b)(2)(B), (c)(2)(A)(ii).)

§ 121a.324 Application of local educational agency to use funds for the second priority.

A local educational agency may use funds provided under Part B of the Act for second priority children, if it provides assurance satisfactory to the State educational agency in its application (or an amendment to its application):

(a) That all first priority children have a free appropriate public education available to them;

(b) That the local educational agency has a system for the identification, location, and evaluation of handicapped children, as described in its application; and

(c) That whenever a first priority child is identified, located, and evaluated, the local educational agency makes available a free appropriate public education to the child.

(20 U.S.C. 1411 (b)(1)(B), (c)(1)(B); 1414(a)(1)(C)(ii).)

INDIVIDUALIZED EDUCATION PROGRAMS

§ 121a.340 Definition.

As used in this part, the term "individualized education program" means a written statement for a handicapped child that is developed and implemented in accordance with §§ 121a.341–121a.349.

(20 U.S.C. 1401(19).)

§ 121a.341 State educational agency responsibility.

(a) *Public agencies.* The State educational agency shall insure that each public agency develops and implements an individualized education program for each of its handicapped children.

(b) *Private schools and facilities.* The State educational agency shall insure that an individualized education program is developed and implemented for each handicapped child who:

(1) Is placed in or referred to a private school or facility by a public agency; or

(2) Is enrolled in a parochial or other private school and receives special education or related services from a public agency.

(20 U.S.C. 1412 (4), (6); 1413(a)(4).)

Comment: This section applies to all public agencies, including other State agencies (e.g., departments of mental health and welfare), which provide special education to a handicapped child either directly, by contract or through other arrangements. Thus, if a State welfare agency contracts with a private school or facility to provide special education to a handicapped child, that agency would be responsible for insuring that an individualized education program is developed for the child.

§ 121a.342 When individualized education programs must be in effect.

(a) On October 1, 1977, and at the beginning of each school year thereafter, each public agency shall have in effect an individualized education program for every handicapped child who is receiving special education from that agency.

(b) An individualized education program must:

(1) Be in effect before special education and related services are provided to a child; and

(2) Be implemented as soon as possible following the meetings under § 121a.343.

(20 U.S.C. 1412 (2)(B), (4), (6); 1414(a)(5); Pub. L. 94–142, Sec. 8(c) (1975).)

Comment. Under paragraph (b)(2), it is expected that a handicapped child's individualized education program (IEP) will be implemented immediately following the meetings under § 121a.343. An exception to this would be (1) when the meetings occur during the summer or a vacation period, or (2) where there are circumstances which require a short delay (e.g., working out transportation arrangements). However, there can be no undue delay in providing special education and related services to the child.

§ 121a.343 Meetings.

(a) *General.* Each public agency is responsible for initiating and conducting meetings for the purpose of developing, reviewing, and revising a handicapped child's individualized education program.

(b) *Handicapped children currently served.* If the public agency has determined that a handicapped child will receive special education during school year 1977–1978, a meeting must be held early enough to insure that an individualized education program is developed by October 1, 1977.

(c) *Other handicapped children.* For a handicapped child who is not included under paragraph (b) of this action, a meeting must be held within thirty calendar days of a determination that the child needs special education and related services.

(d) *Review.* Each public agency shall initiate and conduct meetings to periodically review each child's individualized education program and if appropriate revise its provisions. A meeting must be held for this purpose at least once a year.

(20 U.S.C. 1412 (2)(B), (4), (6); 1414(a)(5).)

Comment. The dates on which agencies must have individualized education programs (IEPs) in effect are specified in § 121a.342 (October 1, 1977, and the beginning of each school year thereafter). However, except for new handicapped children (i.e., those evaluated and determined to need special education after October 1, 1977), the timing of meetings to develop, review, and revise IEPs is left to the discretion of each agency.

In order to have IEPs in effect by the dates in § 121a.342, agencies could hold meetings at the end of the school year or during the summer preceding those dates. In meeting the October 1, 1977 timeline, meetings could be conducted up through the October 1 date. Thereafter, meetings may be held any time throughout the year, as long as IEPs are in effect at the beginning of each school year.

The statute requires agencies to hold a meeting at least once each year in order to review, and if appropriate revise, each child's IEP. The timing of those meetings could be on the anniversary date of the last IEP meeting on the child, but this is left to the discretion of the agency.

§ 121a.344 Participants in meetings.

(a) *General.* The public agency shall insure that each meeting includes the following participants:

(1) A representative of the public agency, other than the child's teacher, who is qualified to provide, or supervise the provision of, special education.

(2) The child's teacher.

(3) One or both of the child's parents, subject to § 121a.345.

(4) The child, where appropriate.

(5) Other individuals at the discretion of the parent or agency.

(b) *Evaluation personnel.* For a handicapped child who has been evaluated for the first time, the public agency shall insure:

(1) That a member of the evaluation team participates in the meeting; or

(2) That the representative of the public agency, the child's teacher, or some other person is present at the meeting, who is knowledgeable about the evaluation procedures used with the child and is familiar with the results of the evaluation.

(20 U.S.C. 1401(19); 1412 (2)(B), (4), (6); 1414(a)(5).)

Comment. 1. In deciding which teacher will participate in meetings on a child's individualized education program, the agency may wish to consider the following possibilities:

(a) For a handicapped child who is receiving special education, the "teacher" could be the child's special education teacher. If the child's handicap is a speech impairment, the "teacher" could be the speech-language pathologist.

(b) For a handicapped child who is being considered for placement in special education, the "teacher" could be the child's regular teacher, or a teacher qualified to provide education in the type of program in which the child may be placed, or both.

(c) If the child is not in school or has more than one teacher, the agency may designate which teacher will participate in the meeting.

2. Either the teacher or the agency representative should be qualified in the area of the child's suspected disability.

3. For a child whose primary handicap is a speech impairment, the evaluation personnel participating under paragraph (b)(1) of this section would normally be the speech-language pathologist.

§ 121a.345 Parent participation.

(a) Each public agency shall take steps to insure that one or both of the parents of the handicapped child are present at each meeting or are afforded the opportunity to participate, including:

(1) Notifying parents of the meeting early enough to insure that they will have an opportunity to attend; and

(2) Scheduling the meeting at a mutually agreed on time and place.

(b) The notice under paragraph (a)(1) of this section must indicate the pur-

pose, time, and location of the meeting, and who will be in attendance.

(c) If neither parent can attend, the public agency shall use other methods to insure parent participation, including individual or conference telephone calls.

(d) A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case the public agency must have a record of its attempts to arrange a mutually agreed on time and place such as:

(1) Detailed records of telephone calls made or attempted and the results of those calls.

(2) Copies of correspondence sent to the parents and any responses received, and

(3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

(e) The public agency shall take whatever action is necessary to insure that the parent understands the proceedings at a meeting, including arranging for an interpreter for parents who are deaf or whose native language is other than English.

(f) The public agency shall give the parent, on request, a copy of the individualized education program.

(20 U.S.C. 1401(19); 1412 (2)(B), (4), (6); 1414(a)(5).)

Comment. The notice in paragraph (a) could also inform parents that they may bring other people to the meeting. As indicated in paragraph (c), the procedure used to notify parents (whether oral or written or both) is left to the discretion of the agency, but the agency must keep a record of its efforts to contact parents.

§ 121a.346 Content of individualized education program.

The individualized education program for each child must include:

(a) A statement of the child's present levels of educational performance;

(b) A statement of annual goals, including short term instructional objectives;

(c) A statement of the specific special education and related services to be provided to the child, and the extent to which the child will be able to participate in regular educational programs;

(d) The projected dates for initiation of services and the anticipated duration of the services; and

(e) Appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the short term instructional objectives are being achieved.

(20 U.S.C. 1401(19); 1412 (2)(B), (4), (6), 1414(a)(5); Senate Report No. 94-168, p. 11 (1975).)

§ 121a.347 Private school placements.

(a) *Developing individualized education programs.* (1) Before a public agency places a handicapped child in, or refers a child to, a private school or facility, the agency shall initiate and conduct a meeting to develop an individualized education program for the child in accordance with § 121a.343.

(2) The agency shall insure that a representative of the private school facility attends the meeting. If the representative cannot attend, the agency shall use other methods to insure participation by the private school or facility, including individual or conference telephone calls.

(3) The public agency shall also develop an individualized educational program for each handicapped child who was placed in a private school or facility by the agency before the effective date of these regulations.

(b) *Reviewing and revising individualized education programs.* (1) After a handicapped child enters a private school or facility, any meetings to review and revise the child's individualized education program may be initiated and conducted by the private school or facility at the discretion of the public agency.

(2) If the private school or facility initiates and conducts these meetings, the public agency shall insure that the parents and an agency representative:

(i) Are involved in any decision about the child's individualized education program; and

(ii) Agree to any proposed changes in the program before those changes are implemented.

(c) *Responsibility.* Even if a private school or facility implements a child's individualized education program, responsibility for compliance with this part remains with the public agency and the State educational agency.

(20 U.S.C. 1413(a)(4)(B).)

§ 121a.348 Handicapped children in parochial or other private schools.

If a handicapped child is enrolled in a parochial or other private school and receives special education or related services from a public agency, the public agency shall:

(a) Initiate and conduct meetings to develop, review, and revise an individualized education program for the child, in accordance with § 121a.343; and

(b) Insure that a representative of the parochial or other private school attends each meeting. If the representative cannot attend, the agency shall use other methods to insure participation by the private school, including individual or conference telephone calls.

(20 U.S.C. 1413(a)(4)(A).)

§ 121a.349 Individualized education program—accountability.

Each public agency must provide special education and related services to a handicapped child in accordance with an individualized education program. However, Part B of the Act does not require that any agency, teacher, or other person be held accountable if a child does not achieve the growth projected in the annual goals and objectives.

(20 U.S.C. 1412(2)(B); 1414(a) (5), (6); Cong. Rec. at H 7152 (daily ed., July 21, 1975).)

Comment. This section is intended to relieve concerns that the individualized education program constitutes a guarantee by the public agency and the teacher that a child will progress at a specified rate. However, this section does not relieve agencies and teachers from making good faith efforts to assist the child in achieving the objectives and goals listed in the individualized education program. Further, the section does not limit a parent's right to complain and ask for revisions of the child's program, or to invoke due process procedures, if the parent feels that these efforts are not being made.

DIRECT SERVICE BY THE STATE EDUCATIONAL AGENCY

§ 121a.360 Use of local educational agency allocation for direct services.

(a) A State educational agency may not distribute funds to a local educational agency, and shall use those funds to insure the provision of a free appropriate public education to handicapped children residing in the area served by the local educational agency, if the local educational agency, in any fiscal year:

(1) Is entitled to less than $7,500 for that fiscal year (beginning with fiscal year 1979);

(2) Does not submit an application that meets the requirements of §§ 121a.220–121a.240;

(3) Is unable or unwilling to establish and maintain programs of free appropriate public education;

(4) Is unable or unwilling to be consolidated with other local educational agencies in order to establish and maintain those programs; or

(5) Has one or more handicapped children who can best be served by a regional or State center designed to meet the needs of those children.

(b) In meeting the requirements of paragraph (a) of this section, the State educational agency may provide special education and related services directly, by contract, or through other arrangements.

(c) The excess cost requirements under §§ 121a.182–121a.186 do not apply to the State educational agency.

(20 U.S.C. 1411(c)(4); 1413(b); 1414(d).)

Comment. Section 121a.360 is a combination of three provisions in the statute (Sections 611(c)(4), 613(b), and 614(d)). This section focuses mainly on the State's administration and use of local entitlements under Part B.

The State educational agency, as a recipient of Part B funds is responsible for insuring that all public agencies in the State comply with the provisions of the Act, regardless of whether they receive Part B funds. If a local educational agency elects not to apply for its Part B entitlement, the State would be required to use those funds to insure that a free appropriate public education (FAPE) is made available to children residing in the area served by that local agency. However, if the local entitlement is not sufficient for this purpose, additional State or local funds would have to be expended in order to insure that "FAPE" and the other requirements of the Act are met.

Moreover, if the local educational agency is the recipient of any other Federal funds, it would have to be in compliance with Subpart D of the regulations for section 504 of the Rehabilitation Act of 1973 (45 CFR Part 84). It should be noted that the term "FAPE" has different meanings under Part B and section 504. For example, under Part

B, "FAPE" is a statutory term which requires special education and related services to be provided in accordance with an individualized education program (IEP). However, under section 504, each recipient must provide an education which includes services that are "designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met • • •" Those regulations state that implementation of an IEP, in accordance with Part B, is one means of meeting the "FAPE" requirement.

§ 121a.361 Nature and location of services.

The State educational agency may provide special education and related services under § 121a.360(a) in the manner and at the location it considers appropriate. However, the manner in which the education and services are provided must be consistent with the requirements of this part (including the least restrictive environment provisions in §§ 121a.550–121a.556 of Subpart E).

(20 U.S.C. 1414(d).)

§ 121a.370 Use of State educational agency allocation for direct and support services.

(a) The State shall use the portion of its allocation it does not use for administration to provide support services and direct services in accordance with the priority requirements under §§ 121a.320–121a.324.

(b) For the purposes of paragraph (a) of this section:

(1) "Direct services" means services provided to a handicapped child by the State directly, by contract, or through other arrangements.

(2) "Support services" includes implementing the comprehensive system of personnel development under §§ 121a.380–121a.388, recruitment and training of hearing officers and surrogate parents, and public information and parent training activities relating to a free appropriate public education for handicapped children.

(20 U.S.C. 1411(b)(2), (c)(2).)

§ 121a.371 State matching.

Beginning with the period July 1, 1978–June 30, 1979, and for each following year, the funds that a State uses for direct and support services under § 121a.370 must be matched on a program basis by the State from funds other than Federal funds. This requirement does not apply to funds that the State uses under § 121a.360.

(20 U.S.C. 1411(c)(2)(B), (c)(4)(B).)

Comment. The requirement in § 121a.371 would be satisfied if the State can document that the amount of State funds expended for each major program area (e.g., the comprehensive system of personnel development) is at least equal to the expenditure of Federal funds in that program area.

§ 121a.372 Applicability of nonsupplanting requirement.

Beginning with funds appropriated for Fiscal Year 1979 and for each following Fiscal Year, the requirement in section 613(a)(9) of the Act, which prohibits supplanting with Federal funds, does not apply to funds that the State uses from its allocation under § 121a.706(a) of Subpart G for administration, direct services, or support services.

(20 U.S.C. 1411(c)(3).)

COMPREHENSIVE SYSTEM OF PERSONNEL DEVELOPMENT

§ 121a.380 Scope of system.

Each annual program plan must include a description of programs and procedures for the development and implementation of a comprehensive system of personnel development which includes:

(a) The inservice training of general and special educational instructional, related services, and support personnel;

(b) Procedures to insure that all personnel necessary to carry out the purposes of the Act are qualified (as defined in § 121a.12 of Subpart A) and that activities sufficient to carry out this personnel development plan are scheduled; and

(c) Effective procedures for acquiring and disseminating to teachers and administrators of programs for handicaped children significant information derived from educational research, demonstration, and similar projects, and for adopting, where appropriate, promising educational practices and materials developed through those projects.

(20 U.S.C. 1413(a)(3).)

§ 121a.381 Participation of other agencies and institutions.

(a) The State educational agency must insure that all public and private institutions of higher education, and other agencies and organizations (including representatives of handicapped, parent, and other advocacy organizations) in the State which have an interest in the preparation of personnel for the education of handicapped children, have an opportunity to participate fully in the development, review, and annual updating of the comprehensive system of personnel development.

(b) The annual program plan must describe the nature and extent of participation under paragraph (a) of this section and must describe responsibilities of the State educational agency, local educational agencies, public and private institutions of higher education, and other agencies:

(1) With respect to the comprehensive system as a whole, and

(2) With respect to the personnel development plan under § 121a.383.

(20 U.S.C. 1412(7)(A); 1413(a)(3).)

§ 121a.382 Inservice training.

(a) As used in this section, "inservice training" means any training other than that received by an individual in a full-time program which leads to a degree.

(b) Each annual program plan must provide that the State educational agency:

(1) Conducts an annual needs assessment to determine if a sufficient number of qualified personnel are available in the State; and

(2) Initiates inservice personnel development programs based on the assessed needs of State-wide significance related to the implementation of the Act.

(c) Each annual program plan must include the results of the needs assessment under paragraph (b)(1) of this section, broken out by need for new personnel and need for retrained personnel.

(d) The State educational agency may enter into contracts with institutions of higher education, local educational agencies or other agencies, institutions, or organizations (which may include parent, handicapped, or other advocacy organizations), to carry out:

(1) Experimental or innovative personnel development programs;

(2) Development or modification of instructional materials; and

(3) Dissemination of significant information derived from educational research and demonstration projects.

(e) Each annual program plan must provide that the State educational agency insures that ongoing inservice training programs are available to all personnel who are engaged in the education of handicapped children, and that these programs include:

(1) The use of incentives which insure participation by teachers (such as released time, payment for participation, options for academic credit, salary step credit, certification renewal, or updating professional skills);

(2) The involvement of local staff; and

(3) The use of innovative practices which have been found to be effective.

(f) Each annual program plan must:

(1) Describe the process used in determining the inservice training needs of personnel engaged in the education of handicapped children;

(2) Identify the areas in which training is needed (such as individualized education programs, non-discriminatory testing, least restrictive environment, procedural safeguards, and surrogate parents);

(3) Specify the groups requiring training (such as special teachers, regular teachers, administrators, psychologists, speech-language pathologists, audiologists, physical education teachers, therapeutic recreation specialists, physical therapists, occupational therapists, medical personnel, parents, volunteers, hearing officers, and surrogate parents);

(4) Describe the content and nature of training for each area under paragraph (f)(2) of this section;

(5) Describe how the training will be provided in terms of (i) geographical scope (such as Statewide, regional, or local), and (ii) staff training source (such as college and university staffs, State and local educational agency personnel, and non-agency personnel);

(6) Specify: (i) The funding sources to be used, and

(ii) The time frame for providing it; and

(7) Specify procedures for effective evaluation of the extent to which program objectives are met.

(20 U.S.C. 1413(a)(3).)

§ 121a.383 Personnel development plan.

Each annual program plan must: (a) Include a personnel development plan which provides a structure for personnel planning and focuses on preservice and inservice education needs;

(b) Describe the results of the needs assessment under § 121a.382(b)(1) with respect to identifying needed areas of training, and assigning priorities to those areas; and

(c) Identify the target populations for personnel development, including general education and special education instructional and administrative personnel, support personnel, and other personnel (such as paraprofessionals, parents, surrogate parents, and volunteers).

(20 U.S.C. 1413(a)(3).)

§ 121a.384 Dissemination.

(a) Each annual program plan must include a description of the State's procedures for acquiring, reviewing, and disseminating to general and special educational instructional and support personnel, administrators of programs for handicapped children, and other interested agencies and organizations (including parent, handicapped, and other advocacy organizations) significant information and promising practices derived from educational research, demonstration, and other projects.

(b) Dissemination includes:

(1) Making those personnel, administrators, agencies, and organizations aware of the information and practices;

(2) Training designed to enable the establishment of innovative programs and practices targeted on identified local needs; and

(3) Use of instructional materials and other media for personnel development and instructional programming.

(20 U.S.C. 1413(a)(3).)

§ 121a.385 Adoption of educational practices.

(a) Each annual program plan must provide for a statewide system designed to adopt, where appropriate, promising educational practices and materials proven effective through research and demonstration.

(b) Each annual program plan must provide for thorough reassessment of educational practices used in the State.

(c) Each annual program plan must provide for the identification of State, local, and regional resources (human and material) which will assist in meeting the State's personnel preparation needs.

(20 U.S.C. 1413(a)(3).)

§ 121a.386 Evaluation.

Each annual program plan must include:

(a) Procedures for evaluating the overall effectiveness of:

(1) The comprehensive system of personnel development in meeting the needs for personnel, and

(2) The procedures for administration of the system; and

(b) A description of the monitoring activities that will be undertaken to assure the implementation of the comprehensive system of personnel development.

(20 U.S.C. 1413(a)(3).)

§ 121a.387 Technical assistance to local educational agencies.

Each annual program plan must include a description of technical assistance that the State educational agency gives to local educational agencies in their implementation of the State's comprehensive system of personnel development.

(20 U.S.C. 1413(a)(3).)

Subpart D—Private Schools

HANDICAPPED CHILDREN IN PRIVATE SCHOOLS PLACED OR REFERRED BY PUBLIC AGENCIES

§ 121a.400 Applicability of §§ 121a.401–121a.403.

Sections 121a.401–121a.403 apply only to handicapped children who are or have been placed in or referred to a private school or facility by a public agency as a means of providing special education and related services.

(20 U.S.C. 1413(a)(4)(B).)

§ 121a.401 Responsibility of State educational agency.

Each State educational agency shall insure that a handicapped child who is placed in or referred to a private school or facility by a public agency:

(a) Is provided special education and related services:

(1) In conformance with an individualized education program which meets the requirements under §§ 121a.340–121a.349 of Subpart C;

(2) At no cost to the parents; and

(3) At a school or facility which meets the standards that apply to State and local educational agencies (including the requirements in this part); and

(b) Has all of the rights of a handicapped child who is served by a public agency.

(20 U.S.C. 1413(a)(4)(B).)

§ 121a.402 Implementation by State educational agency.

In implementing § 121a.401, the State educational agency shall:

(a) Monitor compliance through procedures such as written reports, on-site visits, and parent questionnaires;

(b) Disseminate copies of applicable standards to each private school and facility to which a public agency has referred or placed a handicapped child; and

(c) Provide an opportunity for those private schools and facilities to participate in the development and revision of State standards which apply to them.

(20 U.S.C. 1413(a)(4)(B).)

§ 121a.403 Placement of children by parents.

(a) If a handicapped child has available a free appropriate public education and the parents choose to place the child in a private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall make services available to the child as provided under §§ 121a.450–121a.460.

(b) Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the question of financial responsibility, are subject to the due process procedures under §§ 121a.500–121a.514 of Subpart E.

(20 U.S.C. 1412(2)(B); 1415).)

HANDICAPPED CHILDREN IN PRIVATE SCHOOLS NOT PLACED OR REFERRED BY PUBLIC AGENCIES

§ 121a.450 Applicability of §§ 121a.451–121a.460.

As used in §§ 121a.451–121a.460, "private school handicapped children" means handicapped children enrolled in private schools or facilities other than handicapped children covered under §§ 121a.400–121a.403.

(20 U.S.C. 1413(a)(4)(A).)

§ 121a.451 State educational agency responsibility.

The State educational agency shall insure that:

(a) To the extent consistent with their number and location in the State, provision is made for the participation of private school handicapped children in the program assisted or carried out under this part by providing them with special education and related services; and

(b) The other requirements in §§ 121a.452–121a.460 are met.

(20 U.S.C. 1413(a)(4)(A).)

§ 121a.452 Local educational agency responsibility.

(a) Each local educational agency shall provide special education and related services designed to meet the needs of private school handicapped children residing in the jurisdiction of the agency.

(b) Each local educational agency shall provide private school handicapped children with genuine opportunities to participate in special education and related services consistent with the number of those children and their needs.

(20 U.S.C. 1413(a)(4)(A); 1414(a)(6).)

§ 121a.453 Determination of needs, number of children, and types of services.

The needs of private school handicapped children, the number of them who will participate under this part, and the types of special education and related services which the local educational agency will provide for them must be determined after consultation with persons knowledgeable of the needs of these

children, on a basis comparable to that used in providing for the participation under this part of handicapped children enrolled in public schools.

(20 U.S.C. 1413(a)(4)(A).)

§ 121a.454 Service arrangements.

Services to private school handicapped children may be provided through such arrangements as dual enrollment, educational radio and television, and the provision of mobile educational services and equipment.

(20 U.S.C. 1413(a)(4)(A).)

§ 121a.455 Differences in services to private school handicapped children.

A local educational agency may provide special education and related services to private school handicapped children which are different from the special education and related services it provides to public school children, if:

(a) The differences are necessary to meet the special needs of the private school handicapped children, and

(b) The special education and related services are comparable in quality, scope, and opportunity for participation to those provided to public school children with needs of equal importance.

(20 U.S.C. 1413(a)(4)(a); *Wheeler v. Barrera*, 417 U.S. 402 (1974).)

§ 121a.456 Personnel.

(a) Public school personnel may be made available in other than public school facilities only to the extent necessary to provide services required by the handicapped children for whose needs those services were designed, and only when those services are not normally provided by the private school.

(b) Each State or local educational agency providing services to children enrolled in private schools shall maintain continuing administrative control and direction over those services.

(c) The services provided with funds under Part B of the Act for eligible handicapped children enrolled in private schools may not include:

(1) The payment of salaries of teachers or other employees of private schools except for services performed outside their regular hours of duty and under public supervision and control; or

(2) The construction of private school facilities.

(20 U.S.C. 1413(a)(4)(A).)

§ 121a.457 Equipment.

(a) Equipment acquired with funds under Part B of the Act may be placed on private school premises for a limited period of time, but the title to and administrative control over all equipment must be retained and exercised by a public agency.

(b) In exercising administrative control, the public agency shall keep records of and account for the equipment, and shall insure that the equipment is used solely for the purposes of the program or project, and remove the equipment from the private school premises if necessary to avoid its being used for other purposes or if it is no longer needed for the purposes of the program or project.

(20 U.S.C. 1413(a)(4)(A).)

§ 121a.458 Prohibition of segregation.

Programs or projects carried out in public facilities, and involving joint participation by eligible handicapped children enrolled in private schools and handicapped children enrolled in public schools, may not include classes that are separated on the basis of school enrollment or the religious affiliations of the children.

(20 U.S.C. 1413(a)(4)(A).)

§ 121a.459 Funds and property not to benefit private school.

Funds provided under Part B of the Act and property derived from those funds may not inure to the benefit of any private school.

(20 U.S.C. 1413(a)(4)(A).)

§ 121a.460 Existing level of instruction.

Provisions for serving private school handicapped children may not include the financing of the existing level of instruction in the private schools.

(20 U.S.C. 1413(a)(4)(A).)

Subpart E—Procedural Safeguards

Due Process Procedures for Parents and Children

§ 121a.500 Definitions of "consent", "evaluation", and "personally identifiable".

As used in this part: "Consent" means that: (a) The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication;

(b) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) which will be released and to whom; and

(c) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.

"Evaluation" means procedures used in accordance with §§ 121a.530–121a.534 to determine whether a child is handicapped and the nature and extent of the special education and related services that the child needs. The term means procedures used selectively with an individual child and does not include basic tests administered to or procedures used with all children in a school, grade, or class.

"Personally identifiable" means that information includes:

(a) The name of the child, the child's parent, or other family member;

(b) The address of the child;

(c) A personal identifier, such as the child's social security number or student number; or

(d) A list of personal characteristics or other information which would make it possible to identify the child with reasonable certainty.

(20 U.S.C. 1415, 1417(c).)

§ 121a.501 General responsibility of public agencies.

Each State educational agency shall insure that each public agency establishes and implements procedural safeguards which meet the requirements of §§ 121a.500–121a.514.

(20 U.S.C. 1415(a).)

§ 121a.502 Opportunity to examine records.

The parents of a handicapped child shall be afforded, in accordance with the procedures in §§ 121a.562–121a.569 an opportunity to inspect and review all education records with respect to:

(a) The identification, evaluation, and educational placement of the child, and

(b) The provision of a free appropriate public education to the child.

(20 U.S.C. 1415(b)(1)(A).)

§ 121a.503 Independent educational evaluation.

(a) *General.* (1) The parents of a handicapped child have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section.

(2) Each public agency shall provide to parents, on request, information about where an independent educational evaluation may be obtained.

(3) For the purposes of this part:

(i) "Independent educational evaluation" means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.

(ii) "Public expense" means that the public agency either pays for the full cost of the evaluation or insures that the evaluation is otherwise provided at no cost to the parent, consistent with § 121a.301 of Subpart C.

(b) *Parent right to evaluation at public expense.* A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. However, the public agency may initiate a hearing under § 121a.506 of this subpart to show that its evaluation is appropriate. If the final decision is that the evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

(c) *Parent initiated evaluations.* If the parent obtains an independent educational evaluation at private expense, the results of the evaluation:

(1) Must be considered by the public agency in any decision made with respect to the provision of a free appropriate public education to the child, and

(2) May be presented as evidence at a hearing under this subpart regarding that child.

(d) *Requests for evaluations by hearing officers.* If a hearing officer requests an independent educational evaluation as part of a hearing, the cost of the evaluation must be at public expense.

(e) *Agency criteria.* Whenever an independent evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria which the public agency uses when it initiates an evaluation.

(20 U.S.C. 1415(b)(1)(A).)

§ 121a.504 Prior notice; parent consent.

(a) *Notice.* Written notice which meets the requirements under § 121a.505 must be given to the parents of a handicapped child a reasonable time before the public agency:

(1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child, or

(2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child.

(b) *Consent.* (1) Parental consent must be obtained before:

(i) Conducting a preplacement evaluation; and

(ii) Initial placement of a handicapped child in a program providing special education and related services.

(2) Except for preplacement evaluation and initial placement, consent may not be required as a condition of any benefit to the parent or child.

(c) *Procedures where parent refuses consent.* (1) Where State law requires parental consent before a handicapped child is evaluated or initially provided special education and related services, State procedures govern the public agency in overriding a parent's refusal to consent.

(2)(i) Where there is no State law requiring consent before a handicapped child is evaluated or initially provided special education and related services, the public agency may use the hearing procedures in §§ 121a.506–121a.508 to determine if the child may be evaluated or initially provided special education and related services without parental consent.

(ii) If the hearing officer upholds the agency, the agency may evaluate or initially provide special education and related services to the child without the parent's consent, subject to the parent's rights under §§ 121a.510—121a.513.

(20 U.S.C. 1415(b)(1)(C), (D).)

Comment. 1. Any changes in a child's special education program, after the initial placement, are not subject to parental consent under Part B, but are subject to the prior notice requirement in paragraph (a) and the individualized education program requirements in Subpart C.

2. Paragraph (c) means that where State law requires parental consent before evaluation or before special education and related services are initially provided, and the parent refuses (or otherwise withholds) consent, State procedures, such as obtaining a court order authorizing the public agency to conduct the evaluation or provide the education and related services, must be followed.

If, however, there is no legal requirement for consent outside of these regulations, the public agency may use the due process procedures under this subpart to obtain a decision to allow the evaluation or services without parental consent. The agency must notify the parent of its actions, and the parent has appeal rights as well as rights at the hearing itself.

§ 121a.505 Content of notice.

(a) The notice under § 121a.504 must include:

(1) A full explanation of all of the procedural safeguards available to the parents under Subpart E;

(2) A description of the action proposed or refused by the agency, an explanation of why the agency proposes or refuses to take the action, and a description of any options the agency considered and the reasons why those options were rejected;

(3) A description of each evaluation procedure, test, record, or report the agency uses as a basis for the proposal or refusal; and

(4) A description of any other factors which are relevant to the agency's proposal or refusal.

(b) The notice must be:

(1) Written in language understandable to the general public, and

(2) Provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

(c) If the native language or other mode of communication of the parent is not a written language, the State or local educational agency shall take steps to insure:

(1) That the notice is translated orally or by other means to the parent in his or her native language or other mode of communication;

(2) That the parent understands the content of the notice, and

(3) That there is written evidence that the requirements in paragraph (c)(1) and (2) of this section have been met.

(20 U.S.C. 1415(b)(1)(D).)

§ 121a.506 Impartial due process hearing.

(a) A parent or a public educational agency may initiate a hearing on any of the matters described in § 121a.504(a)(1) and (2).

(b) The hearing must be conducted by the State educational agency or the public agency directly responsible for the education of the child, as determined under State statute, State regulation, or a written policy of the State educational agency.

(c) The public agency shall inform the parent of any free or low-cost legal and other relevant services available in the area if:

(1) The parent requests the information; or

(2) The parent or the agency initiates a hearing under this section.

(20 U.S.C. 1416(b)(2).)

Comment: Many States have pointed to the success of using mediation as an intervening step prior to conducting a formal due process hearing. Although the process of mediation is not required by the statute or these regulations, an agency may wish to suggest mediation in disputes concerning the identification, evaluation, and educational placement of handicapped children, and the provision of a free appropriate public education to those children. Mediations have been conducted by members of State educational agencies or local educational agency personnel who were not previously involved in the particular case. In many cases, mediation leads to resolution of differences between parents and agencies without the development of an adversarial relationship and with minimal emotional stress. However, mediation may not be used to deny or delay a parent's rights under this subpart.

§ 121a.507 Impartial hearing officer.

(a) A hearing may not be conducted:

(1) By a person who is an employee of a public agency which is involved in the education or care of the child, or

(2) By any person having a personal or professional interest which would conflict with his or her objectivity in the hearing.

(b) A person who otherwise qualifies to conduct a hearing under paragraph (a) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer.

(c) Each public agency shall keep a list of the persons who serve as hearing officers. The list must include a statement of the qualifications of each of those persons.

(20 U.S.C. 1414(b)(2).)

§ 121a.508 Hearing rights.

(a) Any party to a hearing has the right to:

(1) Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children;

(2) Present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five days before the hearing;

(4) Obtain a written or electronic verbatim record of the hearing;

(5) Obtain written findings of fact and decisions. (The public agency shall transmit those findings and decisions, after deleting any personally identifiable information, to the State advisory panel established under Subpart F).

(b) Parents involved in hearings must be given the right to:

(1) Have the child who is the subject of the hearing present; and

(2) Open the hearing to the public.

(20 U.S.C. 1415(d).)

§ 121a.509 Hearing decision; appeal.

A decision made in a hearing conducted under this subpart is final, unless

a party to the hearing appeals the decision under § 121a.510 or § 121a.511.

(20 U.S.C. 1415(c).)

§ 121a.510 Administrative appeal; impartial review.

(a) If the hearing is conducted by a public agency other than the State educational agency, any party aggrieved by the findings and decision in the hearing may appeal to the State educational agency.

(b) If there is an appeal, the State educational agency shall conduct an impartial review of the hearing. The official conducting the review shall:

(1) Examine the entire hearing record;

(2) Insure that the procedures at the hearing were consistent with the requirements of due process;

(3) Seek additional evidence if necessary. If a hearing is held to receive additional evidence, the rights in § 121a.508 apply;

(4) Afford the parties an opportunity for oral or written argument, or both, at the discretion of the reviewing official;

(5) Make an independent decision on completion of the review; and

(6) Give a copy of written findings and the decision to the parties.

(c) The decision made by the reviewing official is final, unless a party brings a civil action under § 121a.512.

(20 U.S.C. 1415 (c), (d); H. Rep. No. 94-664, at p. 49 (1975).)

Comment. 1. The State educational agency may conduct its review either directly or through another State agency acting on its behalf. However, the State educational agency remains responsible for the final decision on review.

2. All parties have the right to continue to be represented by counsel at the State administrative review level, whether or not the reviewing official determines that a further hearing is necessary. If the reviewing official decides to hold a hearing to receive additional evidence, the other rights in section 121a.508, relating to hearings, also apply.

§ 121a.511 Civil action.

Any party aggrevied by the findings and decision made in a hearing who does not have the right to appeal under § 121a.510 of this subpart, and any party aggrieved by the decision of a reviewing officer under § 121a.510 has the right to bring a civil action under section 615(e)(2) of the Act.

(20 U.S.C. 1415.)

§ 121a.512 Timeliness and convenience of hearings and reviews.

(a) The public agency shall insure that not later than 45 days after the receipt of a request for a hearing:

(1) A final decision is reached in the hearing; and

(2) A copy of the decision is mailed to each of the parties.

(b) The State educational agency shall insure that not later than 30 days after the receipt of a request for a review:

(1) A final decision is reached in the review; and

(2) A copy of the decision is mailed to each of the parties.

(c) A hearing or reviewing officer may grant specific extensions of time beyond the periods set out in paragraphs (a) and (b) of this section at the request of either party.

(d) Each hearing and each review involving oral arguments must be conducted at a time and place which is reasonably convenient to the parents and child involved.

(20 U.S.C. 1415.)

§ 121a.513 Child's status during proceedings.

(a) During the pendency of any administrative or judicial proceeding regarding a complaint, unless the public agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her present educational placement.

(b) If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school program until the completion of all the proceedings.

(20 U.S.C. 1415(e)(3).)

Comment. Section 121a.513 does not permit a child's placement to be changed during a complaint proceeding, unless the parents and agency agree otherwise. While the placement may not be changed, this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others.

§ 121a.514 Surrogate parents.

(a) *General.* Each public agency shall insure that the rights of a child are protected when:

(1) No parent (as defined in § 121a.10) can be identified;

(2) The public agency, after reasonable efforts, cannot discover the whereabouts of a parent; or

(3) The child is a ward of the State under the laws of that State.

(b) *Duty of public agency.* The duty of a public agency under paragraph (a) of this section includes the assignment of an individual to act as a surrogate for the parents. This must include a method (1) for determining whether a child needs a surrogate parent, and (2) for assigning a surrogate parent to the child.

(c) *Criteria for selection of surrogates.* (1) The public agency may select a surrogate parent in any way permitted under State law.

(2) Public agencies shall insure that a person selected as a surrogate:

(i) Has no interest that conflicts with the interests of the child he or she represents; and

(ii) Has knowledge and skills, that insure adequate representation of the child.

(d) *Non-employee requirement; compensation.* (1) A person assigned as a surrogate may not be an employee of a public agency which is involved in the education or care of the child.

(2) A person who otherwise qualifies to be a surrogate parent under paragraph (c) and (d)(1) of this section, is not an employee of the agency solely because he or she is paid by the agency to serve as a surrogate parent.

(e) *Responsibilities.* The surrogate parent may represent the child in all matters relating to:

(1) The identification, evaluation, and educational placement of the child, and

(2) The provision of a free appropriate public education to the child.

(20 U.S.C. 1415(b)(1)(B).)

PROTECTION IN EVALUATION PROCEDURES

§ 121a.530 General.

(a) Each State educational agency shall insure that each public agency establishes and implements procedures which meet the requirements of §§ 121a.530–121a.534.

(b) Testing and evaluation materials and procedures used for the purposes of evaluation and placement of handicapped children must be selected and administered so as not to be racially or culturally discriminatory.

(20 U.S.C. 1412(5)(C).)

§ 121a.531 Preplacement evaluation.

Before any action is taken with respect to the initial placement of a handicapped child in a special education program, a full and individual evaluation of the child's educational needs must be conducted in accordance with the requirements of § 121a.532.

(20 U.S.C. 1412(5)(C).)

§ 121a.532 Evaluation procedures.

State and local educational agencies shall insure, at a minimum, that:

(a) Tests and other evaluation materials:

(1) Are provided and administered in the child's native language or other mode of communication, unless it is clearly not feasible to do so;

(2) Have been validated for the specific purpose for which they are used; and

(3) Are administered by trained personnel in conformance with the instructions provided by their producer;

(b) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient;

(c) Tests are selected and administered so as best to ensure that when a test is administered to a child with impaired sensory, manual, or speaking skills, the test results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (except where those

skills are the factors which the test purports to measure);

(d) No single procedure is used as the sole criterion for determining an appropriate educational program for a child; and

(e) The evaluation is made by a multidisciplinary team or group of persons, including at least one teacher or other specialist with knowledge in the area of suspected disability.

(f) The child is assessed in all areas related to the suspected disability, including, where appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

(20 U.S.C. 1412(5)(C).)

Comment. Children who have a speech impairment as their primary handicap may not need a complete battery of assessments (e.g., psychological, physical, or adaptive behavior). However, a qualified speech-language pathologist would (1) evaluate each speech impaired child using procedures that are appropriate for the diagnosis and appraisal of speech and language disorders, and (2) where necessary, make referrals for additional assessments needed to make an appropriate placement decision.

§ 121a.533 Placement procedures.

(a) In interpreting evaluation data and in making placement decisions, each public agency shall:

(1) Draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior;

(2) Insure that information obtained from all of these sources is documented and carefully considered;

(3) Insure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and

(4) Insure that the placement decision is made in conformity with the least restrictive environment rules in §§ 121a.550–121a.554.

(b) If a determination is made that a child is handicapped and needs special education and related services, an individualized education program must be developed for the child in accordance with §§ 121a.340–121a.349 of Subpart C.

(20 U.S.C. 1412(5)(C); 1414(a)(5).)

Comment. Paragraph (a)(1) includes a list of examples of sources that may be used by a public agency in making placement decisions. The agency would not have to use all the sources in every instance. The point of the requirement is to insure that more than one source is used in interpreting evaluation data and in making placement decisions. For example, while all of the named sources would have to be used for a child whose suspected disability is mental retardation, they would not be necessary for certain other handicapped children, such as a child who has a severe articulation disorder as his primary handicap. For such a child the speech-language pathologist, in complying with the multisource requirement, might use (1) a standardized test of articulation, and (2) observation of the child's articulation behavior in conversational speech.

§ 121a.534 Reevaluation.

Each State and local educational agency shall insure:

(a) That each handicapped child's individualized education program is reviewed in accordance with §§ 121a.340—121a.349 of Subpart C, and

(b) That an evaluation of the child, based on procedures which meet the requirements under § 121a.532, is conducted every three years or more frequently if conditions warrant or if the child's parent or teacher requests an evaluation.

(20 U.S.C. 1412(5)(c).)

LEAST RESTRICTIVE ENVIRONMENT

§ 121a.550 General.

(a) Each State educational agency shall insure that each public agency establishes and implements procedures which meet the requirements of §§ 121a.550–121a.556.

(b) Each public agency shall insure:

(1) That to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and

(2) That special classes, separate schooling or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

(20 U.S.C. 1412(5)(B); 1414(a)(1)(C)(iv).)

§ 121a.551 Continuum of alternative placements.

(a) Each public agency shall insure that a continuum of alternative placements is available to meet the needs of handicapped children for special education and related services.

(b) The continuum required under paragraph (a) of this section must:

(1) Include the alternative placements listed in the definition of special education under § 121a.13 of Subpart A (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions), and

(2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

(20 U.S.C. 1412(5)(B).)

§ 121a.552 Placements.

Each public agency shall insure that:

(a) Each handicapped child's educational placement:

(1) Is determined at least annually,

(2) Is based on his or her individualized education program, and

(3) Is as close as possible to the child's home;

(b) The various alternative placements included under § 121a.551 are available to the extent necessary to implement the individualized education program for each handicapped child;

(c) Unless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped; and

(d) In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services which he or she needs.

(20 U.S.C. 1412(5)(B).)

Comment. Section 121a.552 includes some of the main factors which must be considered in determining the extent to which a handicapped child can be educated with children who are not handicapped. The overriding rule in this section is that placement decisions must be made on an individual basis. The section also requires each agency to have various alternative placements available in order to insure that each handicapped child receives an education which is appropriate to his or her individual needs.

The analysis of the regulations for Section 504 of the Rehabilitation Act of 1973 (45 CFR Part 84—Appendix, Paragraph 24) includes several points regarding educational placements of handicapped children which are pertinent to this section:

1. With respect to determining proper placements, the analysis states: "* * * it should be stressed that, where a handicapped child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore regular placement would not be appropriate to his or her needs * * *."

2. With respect to placing a handicapped child in an alternate setting, the analysis states that among the factors to be considered in placing a child is the need to place the child as close to home as possible. Recipients are required to take this factor into account in making placement decisions. The parent's right to challenge the placement of their child extends not only to placement in special classes or separate schools, but also to placement in a distant school, particularly in a residential program. An equally appropriate education program may exist closer to home; and this issue may be raised by the parent under the due process provisions of this subpart.

§ 121a.553 Nonacademic settings.

In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in § 121a.306 of Subpart C, each public agency shall insure that each handicapped child participates with nonhandicapped children in those services and activities to the maximum extent appropriate to the needs of that child.

(20 U.S.C. 1412(5)(B).)

Comment. Section 121a.553 is taken from a new requirement in the final regulations for Section 504 of the Rehabilitation Act of 1973. With respect to this requirement, the analysis of the Section 504 Regulations includes the following statement: "[A new paragraph] specifies that handicapped children must also be provided nonacademic services in as integrated a setting as possible. This requirement is especially important for children whose educational needs necessitate their being solely with other handicapped children during most of each day. To the maximum extent appropriate, children in residential settings are also to be provided

opportunities for participation with other children." (45 CFR Part 84—Appendix, Paragraph 24.)

§ 121a.554 Children in public or private institutions.

Each State educational agency shall make arrangements with public and private institutions (such as a memorandum of agreement or special implementation procedures) as may be necessary to insure that § 121a.550 is effectively implemented.

(20 U.S.C. 1412(5)(B).)

Comment. Under section 612(5)(B) of the statute, the requirement to educate handicapped children with nonhandicapped children also applies to children in public and private institutions or other care facilities. Each State educational agency must insure that each applicable agency and institution in the State implements this requirement. Regardless of other reasons for institutional placement, no child in an institution who is capable of education in a regular public school setting may be denied access to an education in that setting.

§ 121a.555 Technical assistance and training activities.

Each State educational agency shall carry out activities to insure that teachers and administrators in all public agencies:

(a) Are fully informed about their responsibilities for implementing § 121a.550, and

(b) Are provided with technical assistance and training necessary to assist them in this effort.

(20 U.S.C. 1412(5)(B).)

§ 121a.556 Monitoring activities.

(a) The State educational agency shall carry out activities to insure that § 121a.550 is implemented by each public agency.

(b) If there is evidence that a public agency makes placements that are inconsistent with § 121a.550 of this subpart, the State educational agency:

(1) Shall review the public agency's justification for its actions, and

(2) Shall assist in planning and implementing any necessary corrective action.

(20 U.S.C. 1412(5)(B).)

CONFIDENTIALITY OF INFORMATION

§ 121a.560 Definitions.

As used in this subpart:

"Destruction" means physical destruction or removal of personal identifiers from information so that the information is no longer personally identifiable.

"Education records" means the type of records covered under the definition of "education records" in Part 99 of this title (the regulations implementing the Family Educational Rights and Privacy Act of 1974).

"Participating agency" means any agency or institution which collects, maintains, or uses personally identifiable information, or from which information is obtained, under this part.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.561 Notice to parents.

(a) The State educational agency shall give notice which is adequate to fully inform parents about the requirements under § 121a.128 of Subpart B, including:

(1) A description of the extent to which the notice is given in the native languages of the various population groups in the State;

(2) A description of the children on whom personally identifiable information is maintained, the types of information sought, the methods the State intends to use in gathering the information (including the sources from whom information is gathered), and the uses to be made of the information;

(3) A summary of the policies and procedures which participating agencies must follow regarding storage, disclosure to third parties, retention, and destruction of personally identifiable information; and

(4) A description of all of the rights of parents and children regarding this information, including the rights under section 438 of the General Education Provisions Act and Part 99 of this title (the Family Educational Rights and Privacy Act of 1974, and implementing regulations).

(b) Before any major identification, location, or evaluation activity, the notice must be published or announced in newspapers or other media, or both, with circulation adequate to notify parents throughout the State of the activity.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.562 Access rights.

(a) Each participating agency shall permit parents to inspect and review any education records relating to their children which are collected, maintained, or used by the agency under this part. The agency shall comply with a request without unnecessary delay and before any meeting regarding an individualized education program or hearing relating to the identification, evaluation, or placement of the child, and in no case more than 45 days after the request has been made.

(b) The right to inspect and review education records under this section includes:

(1) The right to a response from the participating agency to reasonable requests for explanations and interpretations of the records;

(2) The right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and

(3) The right to have a representative of the parent inspect and review the records.

(c) An agency may presume that the parent has authority to inspect and review records relating to his or her child unless the agency has been advised that the parent does not have the authority under applicable State law governing such matters as guardianship, separation, and divorce.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.563 Record of access.

Each participating agency shall keep a record of parties obtaining access to education records collected, maintained, or used under this part (except access by parents and authorized employees of the participating agency), including the name of the party, the date access was given, and the purpose for which the party is authorized to use the records.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.564 Records on more than one child.

If any education record includes information on more than one child, the parents of those children shall have the right to inspect and review only the information relating to their child or to be informed of that specific information.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.565 List of types and locations of information.

Each participating agency shall provide parents on request a list of the types and locations of education records collected, maintained, or used by the agency.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.566 Fees.

(a) A participating education agency may charge a fee for copies of records which are made for parents under this part if the fee does not effectively prevent the parents from exercising their right to inspect and review those records.

(b) A participating agency may not charge a fee to search for or to retrieve information under this part.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.567 Amendment of records at parent's request.

(a) A parent who believes that information in education records collected, maintained, or used under this part is inaccurate or misleading or violates the privacy or other rights of the child, may request the participating agency which maintains the information to amend the information.

(b) The agency shall decide whether to amend the information in accordance with the request within a reasonable period of time of receipt of the request.

(c) If the agency decides to refuse to amend the information in accordance with the request it shall inform the parent of the refusal, and advise the parent of the right to a hearing under § 121a.568.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.568 Opportunity for a hearing.

The agency shall, on request, provide an opportunity for a hearing to challenge information in education records to insure that it is not inaccurate, misleading,

or otherwise in violation of the privacy or other rights of the child.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.569 Result of hearing.

(a) If, as a result of the hearing, the agency decides that the information is inaccurate, misleading or otherwise in violation of the privacy or other rights of the child, it shall amend the information accordingly and so inform the parent in writing.

(b) If, as a result of the hearing, the agency decides that the information is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child, it shall inform the parent of the right to place in the records it maintains on the child a statement commenting on the information or setting forth any reasons for disagreeing with the decision of the agency.

(c) Any explanation placed in the records of the child under this section must:

(1) Be maintained by the agency as part of the records of the child as long as the record or contested portion is maintained by the agency; and

(2) If the records of the child or the contested portion is disclosed by the agency to any party, the explanation must also be disclosed to the party.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.570 Hearing procedures.

A hearing held under § 121a.568 of this subpart must be conducted according to the procedures under § 99.22 of this title.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.571 Consent.

(a) Parental consent must be obtained before personally identifiable information is:

(1) Disclosed to anyone other than officials of participating agencies collecting or using the information under this part, subject to paragraph (b) of this section; or

(2) Used for any purpose other than meeting a requirement under this part.

(b) An educational agency or institution subject to Part 99 of this title may not release information from education records to participating agencies without parental consent unless authorized to do so under Part 99 of this title.

(c) The State educational agency shall include policies and procedures in its annual program plan which are used in the event that a parent refuses to provide consent under this section.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.572 Safeguards.

(a) Each participating agency shall protect the confidentiality of personally identifiable information at collection, storage, disclosure, and destruction stages.

(b) One official at each participating agency shall assume responsibility for insuring the confidentiality of any personally identifiable information.

(c) All persons collecting or using personally identifiable information must receive training or instruction regarding the State's policies and procedures under § 121a.129 of Subpart B and Part 99 of this title.

(d) Each participating agency shall maintain, for public inspection, a current listing of the names and positions of those employees within the agency who may have access to personally identifiable information.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.573 Destruction of information.

(a) The public agency shall inform parents when personally identifiable information collected, maintained, or used under this part is no longer needed to provide educational services to the child.

(b) The information must be destroyed at the request of the parents. However, a permanent record of a student's name, address, and phone number, his or her grades, attendance record, classes attended, grade level completed, and year completed may be maintained without time limitation.

(20 U.S.C. 1412(2)(D); 1417(c).)

Comment. Under section 121a.573, the personally identifiable information on a handicapped child may be retained permanently unless the parents request that it be destroyed. Destruction of records is the best protection against improper and unauthorized disclosure. However, the records may be needed for other purposes. In informing parents about their rights under this section, the agency should remind them that the records may be needed by the child or the parents for social security benefits or other purposes. If the parents request that the information be destroyed, the agency may retain the information in pargraph (b).

§ 121a.574 Children's rights.

The State educational agency shall include policies and procedures in its annual program plan regarding the extent to which children are afforded rights of privacy similar to those afforded to parents, taking into consideration the age of the child and type or severity of disability.

(20 U.S.C. 1412(2)(D); 1417(c).)

Comment. Note that under the regulations for the Family Educational Rights and Privacy Act (45 CFR 99.4(a)), the rights of parents regarding education records are transferred to the student at age 18.

§ 121a.575 Enforcement.

The State educational agency shall describe in its annual program plan the policies and procedures, including sanctions, which the State uses to insure that its policies and procedures are followed and that the requirements of the Act and the regulations in this part are met.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.576 Office of Education.

If the Office of Education or its authorized representatives collect any personally identifiable information regarding handicapped children which is not subject to 5 U.S.C. 552a (The Privacy Act of 1974), the Commissioner shall apply the requirements of 5 U.S.C. section 552a(b) (1)–(2), (4)–(11); (c); (d); (e)(1), (2), (3)(A), (B), and (D), (5)–(10); (h); (m); and (n), and the regulations implementing those provisions in Part 5b of this title.

(20 U.S.C. 1412(2)(D); 1417(c).)

OFFICE OF EDUCATION PROCEDURES

§ 121a.580 Opportunity for a hearing.

The Commissioner gives a State educational agency reasonable notice and an opportunity for a hearing before taking any of the following actions:

(a) Disapproval of a State's annual program plan under § 121a.113 of Subpart B.

(b) Withholding payments from a State under § 121a.590 or under section 434(c) of the General Education Provisions Act.

(c) Waiving the requirement under § 121a.589 of this subpart regarding supplementing and supplanting with funds provided under Part B of the Act.

(20 U.S.C. 1232c(c); 1413(a)(9)(B); 1413(c); 1416.)

§ 121a.581 Hearing panel.

The Commissioner appoints a Hearing Panel consisting of not less than three persons to conduct any hearing under § 121a.530 of this subpart.

(20 U.S.C. 1232c(c); 1413(a)(9)(B); 1413(c); 1416.)

§ 121a.582 Hearing procedures.

(a)(1) If the Hearing Panel determines that oral testimony would not materially assist the resolution of disputed facts, the Panel shall give each party an opportunity for presenting the case:

(i) In whole or in part in writing, or

(ii) In an informal conference before the Hearing Panel.

(2) The Hearing Panel shall give each party:

(i) Notice of the issues to be considered (if this notice has not already been given); and

(ii) An opportunity to be represented by counsel.

(b) If the Hearing Panel determines that oral testimony would materially assist the resolution of disputed facts, the Panel shall give each party, in addition to the requirements under paragraph (a)(2) of this section:

(1) An opportunity to obtain a record of the proceedings;

(2) An opportunity to present witnesses on the party's behalf; and

(3) An opportunity to cross-examine witnesses either orally or with written questions.

(20 U.S.C. 1232c(c); 1413(a)(9)(B); 1413(c); 1416.)

§ 121a.583 Initial decision; final decision.

(a) The Hearing Panel shall prepare an initial written decision which includes findings of fact and the conclusions based on those facts.

(b) The Hearing Panel shall mail a copy of the initial decision to each party (or to the party's counsel) and to the Commissioner, with a notice that each

party has an opportunity to submit written comments regarding the decision to the Commissioner within a specified reasonable time.

(c) The initial decision of the Hearing Panel is the final decision of the Commissioner unless, within 25 days after the end of the time for receipt of written comments, the Commissioner informs the Panel in writing that the decision is being reviewed.

(d) Review by the Commissioner is based on the decision, the written record, if any, of the Hearing Panel's proceedings, and written comments or oral arguments by the parties.

(e) No decision under this section becomes final until it is served on the State educational agency or its attorney.

(20 U.S.C. 1232c(c); 1413(a)(9)(b); 1413(c); 1416.)

§ 121a.589 Waiver of requirement regarding supplementing and supplanting with Part B funds.

(a) Under sections 613(a)(9)(B) and 614(a)(2)(B)(ii) of the Act, State and local Educational agencies must insure that Federal funds provided under Part B of the Act are used to supplement the level of State and local funds expended for the education of handicapped children, and in no case to supplant those State and local funds. Beginning with funds appropriated for fiscal year 1979 and for each following fiscal year, the nonsupplanting requirement only applies to funds allocated to local educational agencies. (See § 121a.372.)

(b) If the State provides clear and convincing evidence that all handicapped children have available to them a free appropriate public education, the Commissioner may waive in part the requirement under sections 613(a)(9)(B) and 614(a)(2)(B)(ii) of the Act if the Commissioner concurs with the evidence provided by the State.

(c) If a State wishes to request a waiver, it must inform the Commissioner in writing. The Commissioner then provides the State with a finance and membership report form which provides the basis for the request.

(d) In its request for a waiver, the State shall include the results of a special study made by the State to obtain evidence of the availability of a free appropriate public education to all handicapped children. The special study must include statements by a representative sample of organizations which deal with handicapped children, and parents and teachers of handicapped children, relating to the following areas:

(1) The adequacy and comprehensiveness of the State's system for locating, identifying, and evaluating handicapped children, and

(2) The cost to parents, if any, for education for children enrolled in public and private day schools, and in public and private residential schools and institutions, and

(3) The adequacy of the State's due process procedures.

(e) In its request for a waiver, the State shall include finance data relating to the availability of a free appropriate public education for all handicapped children, including:

(1) The total current expenditures for regular education programs and special education programs by function and by source of funds (State, local, and Federal) for the previous school year, and

(2) The full-time equivalent membership of students enrolled in regular programs and in special programs in the previous school year.

(f) The Commissioner considers the information which the State provides under paragraph (d) and (e) of this section, along with any additional information he may request, or obtain through on-site reviews of the State's education programs and records, to determine if all children have available to them a free appropriate public education, and if so, the extent of the waiver.

(g) The State may request a hearing under §§ 121a.580–121a.583 with regard to any final action by the Commissioner under this section.

(20 U.S.C. 1411(c)(3); 1413(a)(9)(B).)

§ 121a.590 Withholding payments.

(a) The Commissioner may make the following findings only after reasonable notice and an opportunity for a hearing under §§ 121a.580–121a.583 to the State educational agency involved (and to any local educational agency affected by any failure described in paragraph (a)(2) of this section):

(1) That there has been a failure to comply substantially with the provisions of section 612 and 613 of the Act, or

(2) That in the administration of the annual program plan there is a failure to comply with any provision of this part or with any requirement in the application of a local educational agency approved by the State educational agency under the annual program plan.

(b) After making either of the findings in paragraph (a) of this section, the Commissioner:

(1) Shall, after notifying the State educational agency, withhold any further payments to the State under this part, and

(2) May, after notifying the State educational agency, withhold further payments to the State under the Federal programs referred to in § 121a.139 of Subpart B which are within his jurisdiction, to the extent that funds under those programs are available for the provision of assistance for the education of handicapped children.

(c) If the Commissioner withholds payments under paragraph (b) of this section he may determine:

(1) That withholding is limited to programs or projects under the annual program plan, or portions of it, affected by the failure, or

(2) That the State educational agency must not make further payments under Part B of the Act to specified local educational agencies affected by the failure.

(20 U.S.C. 1416(a).)

§ 121a.591 Reinstating payments.

Until the Commissioner is satisfied that there is no longer any failure to comply with the provisions of this part, as specified in § 121a.590(a):

(a) No further payments shall be made to the State under this part or under the Federal programs specified in section 613(a)(2) of the Act which are within his jurisdiction to the extent that funds under those programs are available for the provision of assistance for the education of handicapped children, or

(b) Payments by the State educational agency under this part shall be limited to local educational agencies whose actions did not cause or were not involved in the failure.

(20 U.S.C. 1416(a).)

§ 121a.592 Public notice by State and local educational agencies.

Any State educational agency and local educational agency which receives a notice under § 121a.590(a) shall by means of a public notice, take any necessary measures to inform the public within the agency's jurisdiction of the pendency of the action.

(20 U.S.C. 1416(a).)

§ 121a.593 Judicial review of Commissioner's final action on annual program plan.

If any State is dissatisfied with the Commissioner's final action with respect to its annual program plan submitted under Subpart B, the State may under section 616(b) of the Act, within sixty days after notice of the action, file a petition for review of that action with the United States Court of Appeals for the circuit in which the State is located.

(20 U.S.C. 1416(b).)

Subpart F—State Administration

State Educational Agency Responsibilities: General

§ 121a.600 Responsibility for all educational programs.

(a) The State educational agency is responsible for insuring:

(1) That the requirements of this part are carried out; and

(2) That each educational program for handicapped children administered within the State, including each program administered by any other public agency:

(i) Is under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency, and

(ii) Meets education standards of the State educational agency (including the requirements of this part).

(b) The State must comply with paragraph (a) of this section through State statute, State regulation, signed agreement between respective agency officials, or other documents.

(20 U.S.C. 1412(6).)

Comment. The requirement in § 121a.600 (a) is taken essentially verbatim from sec-

tion 612(6) of the statute and reflects the desire of the Congress for a central point of responsibility and accountability in the education of handicapped children within each State. With respect to State educational agency responsibility, the Senate Report on P.L. 94-142 includes the following statements:

This provision is included specifically to assure a single line of responsibility with regard to the education of handicapped children, and to assure that in the implementation of all provisions of this Act and in carrying out the right to education for handicapped children, the State educational agency shall be the responsible agency * * *.

Without this requirement, there is an abdication of responsibility for the education of handicapped children. Presently, in many States, responsibility is divided, depending upon the age of the handicapped child, sources of funding, and type of services delivered. While the Committee understands that different agencies may, in fact, deliver services, the responsibility must remain in a central agency overseeing the education of handicapped children, so that failure to deliver services or the violation of the rights of handicapped children is squarely the responsibility of one agency. (Senate Report No. 94-168, p. 24 (1975))

In meeting the requirements of this section, there are a number of acceptable options which may be adopted, including the following:

(1) Written agreements are developed between respective State agencies concerning State educational agency standards and monitoring. These agreements are binding on the local or regional counterparts of each State agency.

(2) The Governor's Office issues an administrative directive establishing the State educational agency responsibility.

(3) State law, regulation, or policy designates the State educational agency as responsible for establishing standards for all educational programs for the handicapped, and includes responsibility for monitoring.

(4) State law mandates that the State educational agency is responsible for all educational programs.

§ 121a.601 Monitoring and evaluation activities.

Each State educational agency shall:

(a) Undertake monitoring and evaluation activities to insure compliance of all public agencies within the State with the requirements of Subparts C, D, and E.

(b) Develop procedures (including specific timelines) for monitoring and evaluating public agencies involved in that education of handicapped children. These procedures must include:

(1) Collection of data and reports;

(2) Conduct of on-site visits;

(3) Audit of Federal fund utilization; and

(4) Comparison of a sampling of individualized education programs with the programs actually provided.

(20 U.S.C. 1412(6); 1413(a)(11).)

Comment: In carrying out the requirements of paragraph (b) of this section, State educational agencies could include additional procedures, such as involving parents or representatives of parent organizations in on-site visits and other monitoring activities.

§ 121a.602 Adoption of complaint procedures.

(a) Each State educational agency shall adopt effective procedures for reviewing, investigating, and acting on any allegations of substance, which may be made by public agencies, or private individuals, or organizations, of actions taken by any public agency that are contrary to the requirements of this part.

(b) In carrying out the requirements in paragraph (a) of this section, the State educational agency shall:

(1) Designate specific individuals within the agency who are responsible for implementing the requirements;

(2) Provide for negotiations, technical assistance activities, and other remedial action to achieve compliance; and

(3) Provide for the use of sanctions, including the withholding of Part B funds in accordance with § 121a.194

(20 U.S.C. 1412(6).)

USE OF FUNDS

§ 121a.620 Federal funds for State administration.

A State may use five per cent of the total State allotment in any fiscal year under Part B of the Act, or $200,000, whichever is greater, for administrative costs related to carrying out sections 612 and 613 of the Act. However, this amount cannot be greater than the amount which the State may use under § 121a.704 or § 121a.705, as the case may be.

(20 U.S.C. 1411 (b), (c).)

§ 121a.621 Allowable costs.

(a) The State educational agency may use funds under § 121a.620 of this Subpart for:

(1) Administration of the annual program plan and for planning at the State level, including planning, or assisting in the planning, of programs or projects for the education of handicapped children;

(2) Approval, supervision, monitoring, and evaluation of the effectiveness of local programs and projects for the education of handicapped children;

(3) Technical assistance to local educational agencies with respect to the requirements of this part;

(4) Leadership services for the program supervision and management of special education activities for handicapped children; and

(5) Other State leadership activities and consultative services.

(b) The State educational agency shall use the remainder of its funds under § 121a.620 in accordance with § 121a.370 of Subpart C.

(20 U.S.C. 1411 (b), (c).)

STATE ADVISORY PANEL

§ 121a.650 Establishment.

(a) Each State shall establish, in accordance with the provisions of this subpart, a State advisory panel on the education of handicapped children.

(b) The advisory panel must be appointed by the Governor or any other official authorized under State law to make those appointments.

(c) If a State has an existing advisory panel that can perform the functions in § 121a.652, the State may modify the existing panel so that it fulfills all of the requirements of this subpart, instead of establishing a new advisory panel.

(20 U.S.C. 1413(a)(12).)

§ 121a.651 Membership.

(a) The membership of the State advisory panel must be composed of persons involved in or concerned with the education of handicapped children. The membership must include at least one person representative of each of the following groups:

(1) Handicapped individuals.

(2) Teachers of handicapped children.

(3) Parents of handicapped children.

(4) State and local educational officials.

(5) Special education program administrators.

(b) The State may expand the advisory panel to include additional persons in the groups listed in paragraph (a) of this section and representatives of other groups not listed.

(20 U.S.C. 1413(a)(12).)

Comment. The membership of the State advisory panel, as listed in paragraphs (a)(1)-(5), is required in section 613(a)(12) of the Act. As indicated in paragraph (b), the composition of the panel and the number of members may be expanded at the discretion of the State. In adding to the membership, consideration could be given to having:

(1) An appropriate balance between professional groups and consumers (i.e., parents, advocates, and handicapped individuals);

(2) Broad representation within the consumer-advocate groups, to insure that the interests and points of view of various parents, advocates and handicapped individuals are appropriately represented;

(3) Broad representation within professional groups (e.g., (a) regular education personnel, (b) special educators, including teachers, teacher trainers, and administrators, who can properly represent various dimensions in the education of handicapped children, and (c) appropriate related services personnel); and

(4) Representatives from other State advisory panels (such as vocational education).

If a State elects to maintain a small advisory panel (e.g., 10-15 members), the panel itself could take steps to insure that it (1) consults with and receives inputs from various consumer and special interest professional groups, and (2) establishes committees for particular short-term purposes composed of representatives from those input groups.

§ 121a.652 Advisory panel functions.

The State advisory panel shall:

(a) Advise the State educational agency of unmet needs within the State in the education of handicapped children;

(b) Comment publicly on the State annual program plan and rules or regulations proposed for issuance by the

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State regarding the education of handicapped children and the procedures for distribution of funds under this part; and

(c) Assist the State in developing and reporting such information and evaluations as may assist the Commissioner in the performance of his responsibilities under section 618.

(20 U.S.C. 1413(a)(12).)

§ 121a.653 Advisory panel procedures.

(a) The advisory panel shall meet as often as necessary to conduct its business.

(b) By July 1 of each year, the advisory panel shall submit an annual report of panel activities and suggestions to the State educational agency. This report must be made available to the public in a manner consistent with other public reporting requirements under this part.

(c) Official minutes must be kept on all panel meetings and shall be made available to the public on request.

(d) All advisory panel meetings and agenda items must be publicly announced prior to the meeting, and meetings must be open to the public.

(e) Interpreters and other necessary services must be provided at panel meetings for panel members or participants. The State may pay for these services from funds under § 121a.620.

(f) The advisory panel shall serve without compensation but the State must reimburse the panel for reasonable and necessary expenses for attending meetings and performing duties. The State may use funds under § 121a.620 for this purpose.

(20 U.S.C. 1413(a)(12).)

Subpart G—Allocation of Funds; Reports

ALLOCATIONS

§ 121a.700 Special definition of the term State.

For the purposes of § 121a.701, § 121a.702, and §§ 121a.704–121a.708, the term "State" does not include Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

(20 U.S.C. 1411(a)(2).)

§ 121a.701 State entitlement; formula.

(a) The maximum amount of the grant to which a State is entitled under section 611 of the Act in any fiscal year is equal to the number of handicapped children aged three through 21 in the State who are receiving special education and related services, multiplied by the applicable percentage, under paragraph (b) of this section, of the average per pupil expenditure in public elementary and secondary schools in the United States.

(b) For the purposes of the formula in paragraph (a) of this section, the applicable percentage of the average per pupil expenditure in public elementary and secondary schools in the United States for each fiscal year is:

(1) 1978—5 percent,

(2) 1979—10 percent,

(3) 1980—20 percent,

(4) 1981—30 percent, and

(5) 1982, and for each fiscal year after 1982, 40 percent.

(20 U.S.C. 1411(a)(1).)

(c) For the purposes of this section, the average per pupil expenditure in public elementary and secondary schools in the United States, means the aggregate expenditures during the second fiscal year preceding the fiscal year for which the computation is made (or if satisfactory data for that year are not available at the time of computation, then during the most recent preceding fiscal year for which satisfactory data are available) of all local educational agencies in the United States (which, for the purpose of this section, means the fifty States and the District of Columbia), plus any direct expenditures by the State for operation of those agencies (without regard to the source of funds from which either of those expenditures are made), divided by the aggregate number of children in average daily attendance to whom those agencies provided free public education during that preceding year.

(20 U.S.C. 1411(a)(4).)

§ 121a.702 Limitations and exclusions.

(a) In determining the amount of a grant under § 121a.701 of this subpart, the Commissioner may not count:

(1) Handicapped children in a State to the extent that the number of those children is greater than 12 percent of the number of all children aged five through 17 in the State;

(2) Children with specific learning disabilities to the extent that the number of those children is greater than two percent of the number of all children aged five through 17 in the State; and

(3) Handicapped children who are counted under section 121 of the Elementary and Secondary Education Act of 1965.

(b) For the purposes of paragraph (a) of this section, the number of children aged five through 17 in any State shall be determined by the Commissioner on the basis of the most recent satisfactory data available to him.

(20 U.S.C. 1411(a)(5).)

§ 121a.703 Ratable reductions.

(a) *General.* If the sums appropriated for any fiscal year for making payments to States under section 611 of the Act are not sufficient to pay in full the total amounts to which all States are entitled to receive for that fiscal year, the maximum amount which all States are entitled to receive for that fiscal year shall be ratably reduced. In case additional funds become available for making payments for any fiscal year during which the preceding sentence is applicable, those reduced amounts shall be increased on the same basis they were reduced.

(20 U.S.C. 1411(g)(1).)

(b) *Reporting dates for local educational agencies and reallocations.*

(1) In any fiscal year in which the State entitlements have been ratably reduced, and in which additional funds have not been made available to pay in full the total of the amounts under paragraph (a) of this section, the State educational agency shall fix dates before which each local educational agency shall report to the State the amount of funds available to it under this part which it estimates it will expend.

(2) The amounts available under paragraph (a)(1) of this section, or any amount which would be available to any other local educational agency if it were to submit an application meeting the requirements of this part, which the State educational agency determines will not be used for the period of its availability, shall be available for allocation to those local educational agencies, in the manner provided in §121a.707, which the State educational agency determines will need and be able to use additional funds to carry out approved programs.

(20 U.S.C. 1411(g)(2).)

§ 121a.704 Hold harmless provision.

No State shall receive less than the amount it received under Part B of the Act for fiscal year 1977.

(20 U.S.C. 1411(a)(1).)

§ 121a.705 Within-State distribution: fiscal year 1978.

Of the funds received under § 121a.701 of this subpart by any State for fiscal year 1978:

(a) 50 percent may be used by the State in accordance with the provisions of § 121a.620 of Subpart F and § 121a.370 of Subpart C, and

(b) 50 percent shall be distributed to local educational agencies in the State in accordance with § 121a.707.

(20 U.S.C. 1411(b)(1).)

§ 121a.706 Within-State distribution: fiscal year 1979 and after.

Of the funds received under § 121a.701 by any State for fiscal year 1979, and for each fiscal year after fiscal year 1979:

(a) 25 percent may be used by the State in accordance with § 121a.620 of Subpart F and § 121a.370 of Subpart C, and

(b) 75 percent shall be distributed to the local educational agencies in the State in accordance with § 121a.707.

(20 U.S.C. 1411(c)(1).)

§ 121a.707 Local educational agency entitlements; formula.

From the total amount of funds available to all local educational agencies, each local educational agency is entitled to an amount which bears the same ratio to the total amount as the number of handicapped children aged three through 21 in that agency who are receiving special education and related services bears to the aggregate number of handicapped children aged three through 21 receiving special education and related services in all local educational agencies which apply to the State educational agency for funds under Part B of the Act.

(20 U.S.C. 1411(d).)

§ 121a.708 Reallocation of local educational agency funds.

If a State educational agency determines that a local educational agency is adequately providing a free appropriate public education to all handicapped children residing in the area served by the local agency with State and local funds otherwise available to the local agency, the State educational agency may reallocate funds (or portions of those funds which are not required to provide special education and related services) made available to the local agency under § 121a.707, to other local educational agencies within the State which are not adequately providing special education and related services to all handicapped children residing in the areas served by the other local educational agencies.

(20 U.S.C. 1414(e).)

§ 121a.709 Payments to Secretary of Interior.

(a) The Commissioner is authorized to make payments to the Secretary of the Interior according to the need for that assistance for the education of handicapped children on reservations serviced by elementary and secondary schools operated for Indian children by the Department of the Interior.

(b) The amount of those payments for any fiscal year shall not exceed one percent of the aggregate amounts available to all States for that fiscal year under Part B of the Act.

(20 U.S.C. 1411(f)(1).)

§ 121a.710 Entitlements to jurisdictions.

(a) The jurisdictions to which this section applies are Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

(b) Each jurisdiction under paragraph (a) of this section is entitled to a grant for the purposes set forth in section 601 (c) of the Act. The amount to which those jurisdictions are so entitled for any fiscal year shall not exceed an amount equal to 1 percent of the aggregate of the amounts available to all States under this part for that fiscal year. Funds appropriated for those jurisdictions shall be allocated proportionately among them on the basis of the number of children aged three through twenty-one in each jurisdiction. However, no jurisdiction shall receive less than $150,000, and other allocations shall be ratably reduced if necessary to insure that each jurisdiction receives at least that amount.

(c) The amount expended for administration by each jurisdiction under this section shall not exceed 5 percent of the amount allotted to the jurisdiction for any fiscal year, or $35,000, whichever is greater.

(20 U.S.C. 1411(e).)

REPORTS

§ 121a.750 Annual report of children served—report requirement.

(a) The State educational agency shall report to the Commissioner no later than April 1 of each year the number of handicapped children aged three through 21 residing in the State who are receiving special education and related services.

(b) The State educational agency shall submit the report on forms provided by the Commissioner.

(20 U.S.C. 1411(a)(3).)

Comment. It is very important to understand that this report and the requirements that relate to it are solely for allocation purposes. The population of children the State may count for allocation purposes may differ from the population of children to whom the State must make available a free appropriate public education. For example, while section 611(a)(5) of the Act limits the number of children who may be counted for allocation purposes to 12 percent of the general school population aged five through seventeen, a State might find that 14 percent (or some other percentage) of its children are handicapped. In that case, the State must make free appropriate public education available to all of those handicapped children.

§ 121a.751 Annual report of children served—information required in the report.

(a) In its report, the State educational agency shall include a table which shows:

(1) The number of handicapped children receiving special education and related services on October 1 and on February 1 of that school year, and the average of the numbers for those two dates;

(2) The number of those handicapped children within each disability category, as defined in the definition of "handicapped children" in § 121a.5 of Subpart A; and

(3) The number of those handicapped children within each of the following age groups:

(i) Three through five;

(ii) Six through seventeen; and

(iii) Eighteen through twenty-one.

(b) A child must be counted as being in the age group corresponding to his or her age on the date of the count: October 1 or February 1, as the case may be.

(c) The State educational agency may not report a child under more than one disability category.

(d) If a handicapped child has more than one disability, the State educational agency shall report that child in accordance with the following procedure:

(1) A child who is both deaf and blind must be reported as "deaf-blind."

(2) A child who has more than one disability (other than a deaf-blind child) must be reported as "multihandicapped."

(20 U.S.C. 1411(a)(3); 1411(a)(5)(A)(ii); 1418(b).)

§ 121a.752 Annual report of children served—certification.

The State educational agency shall include in its report a certification signed by an authorized official of the agency that the information provided is an accurate and unduplicated count of handicapped children receiving special education and related services on the dates in question.

(20 U.S.C. 1411(a)(3); 1417(b).)

§ 121a.753 Annual report of children served—criteria for counting children.

(a) The State educational agency may include handicapped children in its report who are enrolled in a school or program which is operated or supported by a public agency, and which either:

(1) Provides them with both special education and related services; or

(2) Provides them only with special education if they do not need related services to assist them in benefitting from that special education.

(b) The State educational agency may not include handicapped children in its report who:

(1) Are not enrolled in a school or program operated or supported by a public agency;

(2) Are not provided special education that meets State standards;

(3) Are not provided with a related service that they need to assist them in benefitting from special education;

(4) Are counted by a State agency under section 121 of the Elementary and Secondary Education Act of 1965, as amended; or

(5) Are receiving special education funded solely by the Federal Government. However, the State may count children covered under § 121a. 186(b) of Subpart B.

(20 U.S.C. 1411(a)(3); 1417(b).)

Comment. 1. Under paragraph (a), the State may count handicapped children in a Head Start or other preschool program operated or supported by a public agency if those children are provided special education that meets State standards.

2. "Special education," by statutory definition, must be at no cost to parents. As of September 1, 1978, under the free appropriate public education requirement, both special education and related services must be at no cost to parents.

There may be some situations, however, where a child receives special education from a public source at no cost, but whose parents pay for the basic or regular education. This child may be counted. The Office of Education expects that there would only be limited situations where special education would be clearly separate from regular education—generally, where speech therapy is the only special education required by the child. For example, the child might be in a regular program in a parochial or other private school but receiving speech therapy in a program funded by the local educational agency. Allowing these children to be counted will provide incentives (in addition to complying with the legal requirement in section 613(a)(4)(A) of the Act regarding private schools) to public agencies to provide services to children in private schools, since funds are generated in part on the basis of the number of children provided special education and related services. Agencies should understand, however, that where a handicapped child is placed in or referred to a public or private school for educational purposes, special education includes the entire educational program provided to the child. In that case, parents may not be charged for any part of the child's education.

A State may not count Indian children on or near reservations and children on military facilities if it provides them no special

education. If a State or local educational agency is responsible for serving these children, and does provide them special education and related services, they may be counted.

§ 121a.754 Annual report of children served—other responsibilities of the State educational agency.

In addition to meeting the other requirements in this subpart, the State educational agency shall:

(a) Establish procedures to be used by local educational agencies and other educational institutions in counting the number of handicapped children receiving special education and related services;

(b) Set dates by which those agencies and institutions must report to the State educational agency to insure that the State complies with § 121a.750(a);

(c) Obtain certification from each agency and institution that an unduplicated and accurate count has been made;

(d) Aggregate the data from the count obtained from each agency and institution, and prepare the reports required under this subpart; and

(e) Insure that documentation is maintained which enables the State and the Commissioner to audit the accuracy of the count.

(20 U.S.C. 1411(a)(3); 1417(b).)

Comment. States should note that the data required in the annual report of children served are not to be transmitted to the Commissioner in personally identifiable form. States are encouraged to collect these data in non-personally identifiable form.

APPENDIX A—ANALYSIS OF FINAL REGULATION (45 CFR PART 121a) UNDER PART B OF THE EDUCATION OF THE HANDICAPPED ACT

These regulations set forth requirements to be followed by States and localities if they are to receive funds under Part B of the Education of the Handicapped Act. The regulations cover matters such as the identification, location, and evaluation of handicapped children; the provision of free appropriate public education; the establishment of a full educational opportunity goal; the count of handicapped children for allocation purposes; priorities in the use of Part B funds; the proper use of Part B funds; the development of an individualized education program; the creation of a comprehensive personnel development system; procedural safeguards (e.g. right to notice and conduct of hearings); methods to guarantee public participation; and details about State annual program plans and local educational agency applications.

RELATIONSHIP BETWEEN REGULATIONS UNDER PART B AND REGULATIONS UNDER SECTION 504

The regulations under section 504 of the Rehabilitation Act of 1973 (45 CFR Part 84; published at 42 FR 22675; May 4, 1977) deal with nondiscrimination on the basis of handicap and basically require that recipients of Federal funds provide equal opportunities to handicapped persons (for example, that they meet the needs of handicapped persons to the same extent that the needs of nonhandicapped persons are met). Subpart D of the section 504 regulations ("Preschool, Elementary, and Secondary Education") contains requirements very similar to those in Part B of the Education of the Handicapped Act.

Basically, both require that handicapped persons be provided a free appropriate public education; that handicapped students be educated with nonhandicapped students to the extent appropriate; that educational agencies identify and locate all unserved handicapped children; that evaluation procedures be adopted to insure appropriate classification and educational services; and that procedural safeguards be established.

In several respects, however, the section 504 regulations are broader in coverage than Part B. For example, the definition of "handicapped person" and "qualified handicapped person" under section 504 covers a broader population than the definition of "handicapped children" under Part B. Under the Part B definition, a handicapped child is a child who has one of the impairments listed in the Act, who because of that impairment requires special education and related services. Under section 504, a handicapped person is a person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of that type of impairment, or is regarded as having that impairment (§ 84.3(j)).

The regulations for section 504 also deal with a number of subjects not covered by the Part B regulations (for example, barrier-free facilities and program accessibility; employment; postsecondary education and health, welfare and social services). On the other side, Part B contains a substantial number of administrative requirements not included under section 504 (for example, annual program plans and local applications) and requires more detailed procedures and policies in many instances (such as due process procedures).

In several instances, the section 504 regulations specifically reference where a requirement may be met by complying with a requirement under Part B. For example, § 84.33(b)(2), dealing with appropriate education, cites implementation of an individualized education program as one means of meeting the requirement. Section 84.33(d) has a September 1, 1978 outside date for providing an appropriate education to qualified handicapped persons (conforming to the timelines in Part B). Section 84.35(d) indicates that a reevaluation procedure consistent with the Part B requirements is one means of meeting the reevaluation requirements under section 504. Section 84.36, dealing with due process requirements, indicates that compliance with the procedural safeguards in Part B is one means of meeting those requirements.

It should be noted that the term "free appropriate public education" (FAPE) has different meanings under Part B and section 504. For example, under Part B, "FAPE" is a statutory term which requires special education and related services to be provided in accordance with an individualized education program. However, under section 504, each recipient must provide an education which includes "the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met • • •"

There is also a major difference between Part B and the section 504 regulations concerning the matter of exclusion of handicapped children from school. As of the effective date of the section 504 regulations (June 3, 1977), exclusion of handicapped children from school constitutes a violation of those requirements. However, under Part B, States are not required to serve all handicapped children aged 3–18 until September 1, 1978. As stated in Appendix A of the section 504 regulations:

The EHA requires a free appropriate education to be provided to handicapped children "no later than September 1, 1978," but section 504 contains no authority for delaying enforcement. To resolve this problem, a new paragraph (d) has been added to § 84.33. Section 84.33(d) requires recipients to achieve full compliance with the free appropriate public education requirements of § 84.33 as expeditiously as possible, but in no event later than September 1, 1978. The provision also makes clear that, as of the effective date of this regulation, no recipient may exclude a qualified handicapped child from its educational program. This provision against exclusion is consistent with the order of providing services set forth in section 612(3) of the EHA, which places the highest priority on providing services to handicapped children who are not receiving an education.

PART 121a—ASSISTANCE TO STATES FOR EDUCATION OF HANDICAPPED CHILDREN

SUBPART A—GENERAL

Subpart A sets forth the purposes and applicability of these regulations and includes definitions of statutory terms (e.g. free appropriate public education, special education, and related services) and other definitions related to those terms.

The following comments were received regarding Subpart A.

APPLICABILITY OF REGULATIONS TO STATE, LOCAL AND PRIVATE AGENCIES (§ 121a.2)

Comment: A commenter felt that the statement regarding the applicability of the regulations was not clear, and should be revised to indicate that the requirements apply to any public agency serving handicapped children, even if the agency does not receive Part B funds.

Response: A definition of "public agency" has been added to the regulations. The definition includes all political subdivisions in the State that are responsible for educating handicapped children. Throughout the regulation, the term "public agency" has been used to make it clear where the requirements do not apply only to State and local educational agencies. In addition, an explanatory comment was added after section 121a.2 to make it clear that the requirements under Part B are binding on each public agency in the State that has direct or delegated authority for the education of handicapped children, regardless of whether that agency receives Part B funds.

DEFINITIONS (§§ 121a.4–121a.15)

Comment: Hundreds of comments were received regarding definitions in the proposed rules. Commenters requested that new definitions be added, or sought changes in existing definitions, especially definitions of various disability categories and the various types of related services. In many instances, revisions were sought to conform to the most recent definitions adopted or used by professional associations.

Response: Definitions of terms used in the regulations are taken from various statutes, Congressional reports, or materials provided by professional associations and other groups. Where appropriate, the Office of Education has attempted to incorporate changes recommended by commenters, and has made other changes to clarify the definitions. In addition, the following new terms were added:

Definitions of "deaf-blind" and "multihandicapped" were added because these are recognized categories of handicapped children in most States.

A definition of "qualified" was added in order to be able to use a consistent term in

referring to the qualifications of the various personnel.

The definition of "handicapped children" has been modified only by making certain clarifying changes. Although some commenters requested additional changes in the definitions of the various disability categories, it is felt that the definitions in this regulation must closely conform to current usage in the States and professions.

The related services definition was expanded to include "school health services." In addition, changes were made in the definitions of the individual terms included under "related services" (e.g., psychological services and recreation) to conform to recommendations of professional associations.

SUBPART B—STATE ANNUAL PROGRAM PLANS AND LOCAL APPLICATIONS

Subpart B includes the requirements relating to State annual program plans, local educational agency applications, participation by the Bureau of Indian Affairs, and public participation.

Two new sections (sections 121a.150 and 121a.239) have been added to require assurances from the State educational agencies and local educational agencies that the program under Part B will be operated in compliance with the section 504 regulations, including the requirements under section 606 of the Education of the Handicapped Act regarding employment of qualified handicapped individuals in programs assisted under the Act. (The Office for Civil Rights has been delegated authority for enforcing section 606.)

A substantial number of commenters were concerned with the following major issues in this subpart: (1) the amount of data required of State and local educational agencies; (2) the excess costs, nonsupplanting and comparability requirements; and (3) the public participation requirements. In addition, as with other subparts, many commenters objected to statutory requirements and sought interpretations of the statute and regulations.

ANNUAL PROGRAM PLANS

CONDITION OF ASSISTANCE (§ 121a.110)

Section 434(b) of the General Education Provisions Act (GEPA), as amended by Pub. L. 93-380, requires each State to submit (1) a general application containing five assurances, and (2) an annual program plan for each Office of Education program under which funds are provided to local educational agencies through, or under the supervision of, the State educational agency. Under Section 434(b), and the implementing regulations (45 CFR 100b, Subpart B), the general application and an annual program plan take the place of a State plan for Part B (45 CFR 100b.19).

The five assurances required under section 434(b) of the GEPA cover proper administration, fiscal control and accounting, reports, supplanting, and submission of the annual program plan. Where Part B contains plan requirements covering the same subject matters, submission of those plan requirements is satisfied by the State's submission of the general application. They do not have to be submitted as part of the annual plan. The Part B plan provisions which do not have to be submitted in the annual program plan are referenced in 45 CFR § 100b.17(c)(2)(iv). Note that a substantive section on the nonsupplanting requirement for local educational agencies is set out in § 121a.230.

Under 45 CFR 100b.18(c), material may be incorporated by reference in an annual program plan if the material is in a document previously approved by the Commissioner and on file in the Office of Education. This should save some paperwork, particularly in the years after the first annual program plan (for school year 1977-1978) is submitted under these regulations.

The provisions to be included in the annual program plan for Part B are set forth in §§ 121a.120-121a.151 of these regulations (which include the conditions of eligibility and the State plan requirements under sections 612 and 613 of the Act and section 434(b)(1)(B)(ii) of the GEPA (which requires each annual program plan to "set forth a statement describing the purposes for which Federal funds will be expended during the fiscal year for which the annual program plan is submitted")).

APPROVAL; DISAPPROVAL (§ 121a.113)

The following is clarification about the submission of draft annual program plans for review by the Office of Education and how this would affect the issuance of grant award documents:

A State educational agency may elect to send a copy of its proposed annual program plan to the Commissioner for technical assistance purposes at the same time that the plan is being made available for public comment. However, funds cannot be obligated by a State before the date on which its official adopted plan is received in substantially approvable form by the Federal Government. (See 45 CFR 100b.35.)

EXAMPLE: A State educational agency's proposed plan for a particular school year is received by the Bureau of Education for the Handicapped on June 1. Its official plan is received on August 1. When BEH approves the plan (e.g. September 1), the State educational agency will receive a grant award document which will show August 1, as the earliest date of obligation under that plan.

EFFECTIVE PERIOD OF ANNUAL PROGRAM PLAN (§ 121a.114)

The Office of Education is proposing to use the period July 1-June 30 for State annual program plans in those programs where appropriations become available for obligation by the Federal Government each July 1 (the so-called "advance funded" programs). The purpose of this is to meet the statutory requirement for an annual program plan covering a 12-month period and at the same time to conform as closely as possible to the regular school year. However, even if the proposed procedure is adopted, the obligational period of State and local agencies for funds from any fiscal year would not be changed. If a State submits its annual program plan and receives its grant on the earliest possible date (July 1), the funds are available for obligation at the State and local level for 27 months, subject to submission or extension of the annual program plan for the following year. (This period includes the 12-month carryover provision under the Tydings Amendment. See 45 CFR 100b.55 (Obligation by recipients).) For example, if a State received its grant for fiscal year 1978 on July 1, 1977, the funds would be available for obligation at the State and local level from July 1, 1977 through September 30, 1979. The rules which govern when an annual program plan becomes effective, and State and local authority to obligate the Federal funds are located in 45 CFR Part 100b, Subpart B.

PUBLIC PARTICIPATION (§ 121a.120)

Comment: Commenters wanted this section to be expanded to require the States to describe in detail a number of additional specific steps to be taken in complying with the public participation requirements of the Act. For example, they wanted States to develop a roster of interested persons to whom plans and other documents would routinely be sent. The commenters felt that these steps would be necessary to insure full public participation.

Response: Requirements have been added (in §§ 121a.280 et seq.) to spell out in more detail the State's duties regarding public participation in development of the annual program plan (for example, indicating in the notice of public hearings of the plan the timetable for developing the final plan and submitting it to the Commissioner). A requirement has also been added to specify that the plan must be available for comment at least 30 days following the date notice is given.

Another revised section indicates that the public participation requirements for local educational agencies are to be comparable to those required of the State, except that public hearings are not required (§ 121a.234).

FULL EDUCATIONAL OPPORTUNITY GOAL REQUIREMENTS (§§ 121a.124-121a.126)

Comment: Commenters disagreed about the amount of data which should be required under this (and other) sections. Some commenters sought to have the regulations require a substantial amount of additional data (about the population of handicapped children and their placements) on the grounds that it is needed for effective monitoring. Others sought to have the amount of data to be reported substantially reduced as unnecessary and fulfilling no useful purpose.

Response: The final regulations eliminate the data requirements in proposed section 121a.24(a) for school year 1977-1978. Since the funds for FY 1978 became available for obligation by the Federal government on July 1, 1977, the States began submitting annual program plans for school year 1977-1978 before these regulations were published. Therefore, it would be inappropriate to impose a retroactive data requirement. No substantive change has been made in the data requirement for school years 1978-1979 and thereafter. The Office of Education believes that the remaining amount of data sought is necessary and adequate to provide information on what and how children are being served. Additional information may be sought on a case by case basis from each State where necessary to monitor compliance with Part B. In addition, requirements have been added to Subpart F to increase each State's monitoring and enforcement obligations.

Comment: Commenters requested that the data requirements regarding personnel needed to meet the full educational opportunity goal include various other professional groups, such as physical therapists, or use terms currently accepted by the professions, such as "therapeutic recreation specialists" rather than "recreation therapists."

Response: These changes have been made to cover the various personnel who provide special education or related services and to use terms currently recognized by the appropriate professional associations.

LOCAL EDUCATIONAL AGENCY APPLICATIONS

PARENT INVOLVEMENT (§ 121a.226)

Comment: Commenters wanted the regulations to require the establishment of a parent advisory committee in each school district.

Response: No change has been made. Extensive public and parental participation is already required under sections 121a.226 and 121a.234.

EXCESS COST REQUIREMENTS (§§ 121a.182–121a.186)

Comment: A substantial number of commenters requested clarification and explanation of the excess cost requirement.

Response: The section on excess costs has been broken out into five sections for easier reading. Section 121a.184 specifies that a local educational agency must spend a certain minimum amount for the education of handicapped children before Part B funds may be used. A detailed example of determining the minimum amount follows revised section 121a.184.

NONSUPPLANTING AND COMPARABLE SERVICES (§§ 121a.230–121a.231)

Comment: A substantial number of commenters requested clarification of these requirements. Some commenters proposed detailed procedures and urged that the regulations require the reporting of a substantial amount of data to monitor compliance with these requirements. Some commenters felt the comparability requirement should be met by comparing expenses for regular and special education.

Response: These sections have been substantially revised to attempt to explain these requirements. Detailed procedures and reporting requirements are not adopted at this time because local educational agencies are otherwise required to maintain auditable records to document their compliance with these and other requirements.

Regarding nonsupplanting, the regulation provides that the requirement applies to total aggregate funds and particular costs. A local educational agency meets the requirement if (1) the total amount or average per capita amount of State and local school funds budgeted by the local educational agency for expenditures in the current fiscal year for the education of handicapped children is at least equal to the total amount or average per capita amount of State and local school funds actually expended for their education in the most recent preceding fiscal year for which information is available. Allowances may be made for decreases in enrollment of handicapped children and unusually large amounts of funds expended for long-term purposes (construction); and (2) Part B funds are not used to displace State or local funds for any particular cost.

The statutory requirement for comparability is implemented by prohibiting a local educational agency from using funds under Part B to provide services to handicapped children, unless the agency uses State and local funds to provide services to those children which, taken as a whole, are at least comparable to services provided to other handicapped children in that local educational agency. This should insure that handicapped children who receive services with Part B funds are treated equally with handicapped children who do not receive services with Part B funds. It would be too difficult to make an objective comparison between special and regular education. The concern of the commenters who asked for this comparison should be met by the excess cost requirement, which provides that a local educational agency must spend a minimum amount, on the average, for each of its handicapped children.

Comment: Commenters requested that the regulations make it clear that the local applications must meet the requirements imposed on the State in Subpart B.

Response: A section has been added to make it clear that each local application must include additional procedures and other information which the State educational agency may require in order to meet the State annual program plan requirements in Subpart B. The requirement for local educational agencies to be consistent with the annual program plan is set forth in section 121a.236.

APPLICATION FROM SECRETARY OF INTERIOR (§§121a.260–121a.261)

These sections have been rewritten to clarify that the annual application by the Secretary of the Interior for schools operated for Indian children must meet the applicable requirements of section 614(a), include other material as agreed to by the Commissioner and the Secretary of the Interior, and meet monitoring and public participation requirements.

PUBLIC PARTICIPATION

See the comments on Section 121a.120.

SUBPART C—SERVICES

Subpart C contains regulations governing the major service components required under Part B of the Act. These include free appropriate public education, the full educational opportunity goal, priorities in the use of Part B funds, individualized education programs, direct services by the State educational agency, and the State comprehensive system of personnel development.

FREE APPROPRIATE PUBLIC EDUCATION

FREE APPROPRIATE PUBLIC EDUCATION REQUIREMENTS (§§121a.300–121a.303)

Comment: Commenters disagreed with the interpretation of "State law or practice" in the proposed regulations. Some commenters felt the exception to the requirement to make free appropriate public education (FAPE) available to children in the age ranges three through five and 18 through 21 applies only if State law (or a court order) specifically prohibits services, or only if the State's practice is to provide services to less than a majority of the State's handicapped children. Others felt the requirement does not apply to the lower and upper age ranges unless the State is in fact serving all nonhandicapped children in those age ranges.

Response: The requirement has been redrafted to clarify the use of the exception and to insure at a minimum that handicapped children in any of these age ranges are served to the extent nonhandicapped children are served (to be consistent with nondiscrimination requirements under section 504).

Section 121a.300 ("Timeliness for free appropriate public education") breaks "practice" down by individual public agency, disability category, and age group. This revision is designed to maximize the number of handicapped children aged 3–5 and 18–21 who receive services. It should reduce the reluctance of agencies wishing to serve children in those age groups, because services to a few handicapped children will not require services to all handicapped children in all of the disabilities.

Section 121a.300 also includes an amendment designed to insure that each time a public agency elects to serve a handicapped child, the child receives the full range of rights and services, whether or not FAPE is mandated for that age range.

FREE APPROPRIATE PUBLIC EDUCATION METHODS AND PAYMENTS (§ 121a.301–121a.303)

Comment: Commenters disagreed on which agencies or parties should bear the costs of educating a handicapped child, especially room and board costs. Commenters sought clarification of when the costs must be borne by the State or local educational agency.

Response: The proposed regulation on methods and costs for FAPE (proposed § 121a.201) has been redrafted and expanded as follows:

(1) A new paragraph has been added to section 121a.301, which states: "Nothing in this part relieves an insurer or similar third party from an otherwise valid obligation to provide or to pay for services provided to a handicapped child."

(2) Section 121a.302 states that if placement in a public or private residential program is necessary to provide FAPE to a handicapped child, the program (including non-medical care and room and board) must be at no cost to the child's parents.

Both of these changes have been made to conform to the regulations implementing section 504.

Other Changes: A new section 121a.303 has been added regarding the proper functioning of hearing aids. This section is based on a special study conducted by the Office of Education ("The Condition of Hearing Aids as Worn by Children in Public Schools," GPO publication date Summer, 1977).

FULL EDUCATIONAL OPPORTUNITY GOAL (§§ 121a.304–121a.306)

The statutory terms "free appropriate public education" and "full educational opportunity goal" are distinguished in this regulation as follows:

"Free appropriate public education" (FAPE) must (1) be made available to all handicapped children within the mandated time lines and age ranges set forth in the Act, and (2) include special education and related services which are provided in accordance with an individualized education program.

"Full educational opportunity goal" is broader in scope than "FAPE." It is an all-encompassing term, which (1) covers all handicapped children aged birth through twenty-one, (2) includes a basic planning dimension (including making projections of the estimated numbers of handicapped children), (3) permits each agency to establish its own timetable for meeting the goal, and (4) calls for the provision of additional facilities, personnel, and services to further enrich a handicapped child's educational opportunity beyond that mandated under the "FAPE" requirement. The term "goal" means an end to be sought. However, while an agency may never achieve its goal in the absolute sense, it must be committed to implementing this provision, and must be in compliance with the policies and procedures in the Annual Program Plan under this provision. Further, the agency is not relieved from its obligations under the "FAPE" requirement.

The proposed rule on full educational opportunity goal has been revised as follows: Proposed paragraph (a) (Program options) is now § 121a.305 and proposed paragraph (b) (Non-academic services) is now § 121a.306. A new § 121a.304 has been added which (1) requires each State educational agency to insure that each public agency establishes and implements a goal of providing full educational opportunity to all handicapped children, and (2) authorizes State and local educational agencies to use Part B funds to provide the facilities, personnel and services necessary to meet the goal.

A comment has been added following section 121a.304 which points to Congressional interest in having artistic and cultural activities included in programs supported under this part, subject to the priorities.

Comment: Many commenters asked that additional areas be added to the program options requirement (e.g., leisure education, cultural and performing arts, and occupational education). Other commenters requested that the term "consumer and homemaking education" be substituted for "home economics" in order to be consistent with the

vocational education amendments of 1976 (Pub. L. 94-482).

Response: No substantive change was made in this requirement. The program options included are examples and the list is not exhaustive. Under the regulation implementing section 504, any program provided to nonhandicapped students must also be made available to handicapped pupils. The language conforming to the vocational education amendments was added.

Comment: Commenters requested that under the requirement on nonacademic services the term "cocurricular" be substituted for "extra curricular" and that intramural, extramural, and interscholastic athletics be included in order to insure consistent use of terminology as it applies nationally. Another commenter suggested that specific language be included regarding participation of visually handicapped persons.

Response: The suggested terms were not adopted. This section conforms to the language in the final regulations under section 504. Also, the suggested language on visually handicapped was not included. This requirement applies to all handicapped individuals, including those with visual handicaps.

PHYSICAL EDUCATION (§ 121a.307)

Comment: Some commenters felt that the section on physical education (PE) needed to be clarified, particularly the conditions under which a handicapped child would not be required to participate in the regular PE program; (e.g., the child (a) is enrolled full-time in a separate facility, (b) needs specially designed PE, or (c) the parents and agency agree that the child should not participate). The main concern dealt with the parent-agency agreement, because it appeared to provide a loophole in which a child would not be required to participate in any PE activity.

Response: The statement on parent-agency agreement was deleted. With this change, a handicapped child attending a regular school would participate in the regular PE program, unless the child needs specially designed PE as prescribed in his or her individualized education program (IEP). Parent-agency agreement is inherent in the development of a child's IEP. The decision as to whether the child should be in the regular PE program or receive specially designed PE is made in the IEP meeting in which the parent and agency personnel are represented.

It should be noted that every handicapped child would participate in some type of PE activity. Specially designed PE could involve arrangements for a child to participate in some individual sport or physcial activity (e.g., weight lifting, bowling, or an exercise or motor activity program).

Other changes: Proposed section 121a.204 (Incidental use of property) has been deleted.

PRIORITIES IN THE USE OF PART B FUNDS

As part of the provision on free appropriate public education, the law requires each State and local educational agency to establish priorities, first with respect to handicapped children not receiving an education (defined as "first priority children" in the regulations) and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education (defined as "second priority children"). The law further requires that, except for State administration funds, each State and local educational agency must use its full entitlement under part B "in accordance with the priorities." The regulations which implement these priority requirements are included in sections 121a.320-121a.324.

PRIORITIES (§ 121a.321)

Comment: Many commenters were concerned that first priority expenditures cannot be used for inservice training for personnel who can serve those students, and stated that such inservice training activities may be an essential component toward achieving the first priority.

Response: The proposed rules have been redrafted and expanded in order to address the above concerns. A new section was added to make it clear that an agency may use Part B funds for inservice training concurrently with placing a first priority child in school (in an interim program, if a component of the child's program is missing). However, the provision of inservice training may not be used as a pre-condition for service to the child.

The intent of Congress with respect to the education of first priority children is both long-standing (dating back to Pub. L. 93-380) and very clear, as reflected in the following statements:

(1) The Congress has a responsibility "• • • to see that all persons are assured equal opportunity. For handicapped children, this means, at the very least, that they must be educated • • • These funds must be focused in such a way that we are assured that handicapped children are provided their right to education." (Congressional Record—Senate, June 18, 1975, p. S10969)

(2) "First priority for spending under the legislation is to provide services for handicapped children who are not now being served. The flexible approach in the Conference Report with respect to the current fiscal year, fiscal year 1977 and fiscal year 1978 will allow for concentrations of moneys so that this priority can be met." (Congressional Record—House of Representatives, November 18, 1975, p H12348)

(3) "There are millions of children with handicapping conditions who are receiving no services at all. And since we must have a place to start, it is appropriate that we give priority to those who are receiving no services at all first, and then try to reach those with the most severe handicaps who have traditionally received only minimal attention second." (Congressional Record—Senate, June 18, 1975, p S10961)

Comment: Several commenters requested clarification regarding whether the requirements on the use of funds for priorities apply within or among local educational agencies (e.g., if an agency is serving all of its first priority children, could a State give that agency's entitlement to another agency which is not serving all of its first priority children?).

Response: No change has been made. The statute does not permit the State to take away a local educational agency's Part B funds solely because the local educational agency is serving all of its first priority children. For the limited circumstances where a local educational agency's funds may be reallocated, see section 121a.708.

Other changes: A new paragraph (c) has been added to section 121a.321, which provides that Part B funds cannot be used for preservice training. This addition was made to implement Congressional intent expressed in Senate Report No. 94-168, p. 34 (1975), in which it was stated that funds for preservice training are available under the training program under Part D of the Act, and that Part B funds should not be used for this purpose.

INDIVIDUALIZED EDUCATION PROGRAM

The requirements on individualized education programs (IEPs) in Subpart C have been reorganized and redrafted substantially, based largely on comments received. (These sections have been renumbered, starting with section 121a.340.) A summary of these changes is included below:

(1) A definition of IEP has been added which states that the term "IEP" means a written statement on a handicapped child that is developed and implemented in accordance with sections 121a.341-121a.349 of Subpart C.

(2) The proposed section entitled, "Scope" has been deleted and the substance combined with the section on "State educational agency responsibility."

(3) The proposed section on "Local educational agency responsibility" has been replaced by two new sections ("When IEPs must be in effect" and "Meetings").

(4) The section on "Participants in meetings" has been redrafted to adopt essentially verbatim the language in the Act and to add a new paragraph on participation of evaluation personnel.

(5) The proposed section on "Parent participation" has been amended to include specific provisions regarding notifying parents about the IEP meetings.

(6) The substance under the proposed section on "Content of IEP" has been replaced with the statutory language.

(7) The proposed section on "Private school placements" has been reorganized into two sections to conform to the two groups of private school handicapped children in Subpart D, and has been expanded to spell out in more detail the responsibilities of State and local educational agencies in administering this provision.

(8) A new section was added, entitled, "IEP—accountability."

TIMING OF IEP MEETINGS (§§ 121a.342-121a.343)

Comment: Many commenters felt that the final rules should provide more flexibility to agencies in terms of when IEP meetings are conducted.

Response: The following changes were made in the proposed rules in an attempt to clarify this provision. First, the regulations now specify the dates on which IEP's must be in effect (October 1, 1977, and the beginning of each school year thereafter). Second, except for new handicapped children (those initially evaluated after October 1, 1977), the timing of meetings to develop, review and revise IEPs is left to the discretion of each agency. (For a new handicapped child, a meeting must be held within thirty days of a determination that he or she needs special education.) The regulations are flexible on the schedule to be followed by public agencies in meeting the above dates.

PARTICIPANTS IN IEP MEETINGS (§ 121a.344)

Comment: A number of commenters recommended that personnel from specific disciplines be participants at IEP meetings (e.g., physicians, health care personnel, psychologists, and representatives from other agencies, such as Head Start). Some commenters felt that the meetings should include all direct service personnel who work with a handicapped child. Other commenters suggested cutting back on the number of people who participate.

Response: The final regulations only require the participants listed in the statute, except in the case of a child who has been evaluated for the first time. (NOTE: Participation of evaluation personnel in IEP meetings is covered under the next comment-response sequence.)

Generally, having a large group of people at an IEP meeting may be unproductive and

very costly, and could essentially defeat the purpose of insuring active, open parent involvement.

While it is necessary to insure that all direct services personnel who work with a handicapped child are informed about and involved in implementing the child's IEP, this does not mean that they should attend the IEP meetings. The mechanism for insuring the involvement of all IEP implementers is left to the discretion of each agency (e.g., the child's teacher, or principal, or supervisor could have that responsibility). However, this is a basic administrative procedure which can be handled outside of the context of the IEP meeting.

The statute does not require all IEP implementers to be involved in the meetings. In fact, the definition of IEP in section 602(19) of the Act includes only four people (e.g., a special education provider or supervisor, the teacher, the parent, and the child, where appropriate). Moreover, it was the intent of Congress that IEP meetings generally be small. This position is reflected in the following statement by Senator Randolph in the June 18, 1975 Congressional Record:

In answer to my colleague, it was the intent, and I believe, I can speak for the subcommittee and the committee in this matter, that these meetings * * * be small meetings; that is, confined to those persons who have, naturally an intense interest in a particular child, i.e., the parent or parents, and in some cases the guardian of the child. Certainly the teacher involved or even more than one teacher would be included. In addition, there should be a representative of the local educational agency who is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children.

These are the persons that we thought might well be included. That is why we have called them "individualized planning conferences". We believe that they are worthwhile, and we discussed this very much as we drafted the legislation.

While very large IEP meetings might generally be inappropriate, there may be specific instances where additional participants are essential. In order to enable other persons to be included, the Office of Education retained a provision from the proposed rules which authorized the attendance of "other participants, at the discretion of the agency or parents."

Comment: Some commenters recommended that members of the evaluation team participate in IEP meetings.

Response: A new paragraph has been added which states, in effect, that an evaluation person must participate in any IEP meetings conducted for handicapped children who have been evaluated for the first time (i.e., the preplacement evaluation required under section 121a.531 of Subpart E). Since the meeting is intended to develop an education program for the child, it is essential that someone at the meeting be familiar with the child's evaluation.

Comment: Several commenters recommended that the representative of the agency be qualified in the disability area in which the IEP is written.

Response: A comment has been added following section 121a.344 which suggests (but does not require) that either the teacher or the agency representative should be qualified in the area of suspected disability. At the time of the meeting, the public agency may not yet have hired a person qualified to provide special education with respect to that suspected disability.

PARENT PARTICIPATION (§ 121a.345)

Comment: Some commenters stated that documenting efforts to involve parents would be difficult and time consuming. One commenter felt it was important to retain the general statement requiring agencies to involve parents, but recommended that the details in the parent participation section be deleted from the final regulation. Another commenter recommended that the section be dropped because it is not required in the law and is "* * * utterly paternalistic. If a local education agency is foolish enough to keep inadequate records on transactions with parents, it alone stands in jeopardy; there is no damage to parents or to handicapped children."

Response: The comments have not been adopted. The Office of Education believes that it is important to retain this section in the final regulations, for the following reasons:

First, the section provides rules that allow agencies to proceed in conducting IEP meetings in cases where parents cannot or will not attend. Without this authorization, the IEP process might come to a halt in some cases, since the law states that an IEP must be developed at a meeting with the parents.

Second, the section is designed to protect agencies by setting the conditions under which they can proceed.

Third, the section is designed to protect the rights of the parents. The Congress intended that IEP meetings be utilized as an extension of the procedural protections guaranteed under Pub. L. 93-380. However, if the regulations provided an authorization for agencies to proceed without the parents, there is a potential problem that the authorization (without documentation) might be inappropriately applied in individual cases, which could result in parents' rights not being protected.

Comment: A few commenters suggested using surrogate parents if a child's parents could not attend an IEP meeting. One commenter recommended adding a provision to enable the parents to designate a person to represent them at a meeting.

Response: The Office of Education elected not to write regulations on either of these suggestions.

First, a surrogate parent is appointed only in accordance with the procedural safeguards in Subpart E. The provision was not meant to apply in situations when parents are unwilling to participate, or when an agency makes unsuccessful efforts to communicate with a known parent. A surrogate parent is appointed only when the parents are unknown, unavailable or the child is a ward of the state. However, a surrogate parent appointed under appropriate circumstances would attend the IEP meetings and represent the child in all matters relating to the provision of a free appropriate public education to the child.

Second, with respect to parent designated representatives, the Office of Education does not feel that any change in the regulation is warranted. Parents unable to attend an IEP meeting, who are interested enough in their child's education to seek a third party representative, would have direct input in developing the child's IEP through individual or conference telephone calls or other methods authorized under paragraph (c) of section 121a.345.

Other changes. A new paragraph (f) has been added to require that parents be given a copy of the IEP on request. This should help to insure that the parents are fully informed of the program for their child, and will assist them in participating in future meetings on the IEP.

CONTENT OF IEP (§ 121a.346)

Comment: Hundreds of commenters responded to this section. Some commenters requested that additional services or other items be added. Other commenters recommended that the section be sharply cut back, because they felt that this went unnecessarily beyond the items listed in the statute. Many of the commenters wanted the specific service areas they represent added to the list of services to be provided in the IEP. Others felt that this went unnecessarily beyond the items listed in the statute.

Response: The Office of Education has elected to amend this section by adopting substantially verbatim the language from section 602(19) of the statute. The regulation retains one clarification from the proposed rules, that the individualized education program must include related services to be provided to the child, as well as special education and the extent to which the child can participate in regular education programs. However, given the controversy over this section and whether it is appropriate to add items not specifically covered in the statute, the Office of Education has decided that some experience operating under the statute would be useful before considering whether further regulations on this point would be appropriate.

IEP—ACCOUNTABILITY (§121a.349)

Comment: In the preamble to the proposed rules, a statement was made that the IEP is not a legally binding document. Many commenters recommended that this statement should be included in the body of the final regulations. Other commenters felt that the statement needed to be clarified.

Response: The Office of Education has added a new section, which states, in effect, that each public agency must provide special education and related services in accordance with a handicapped child's IEP. However, Part B does not require that the agency, the teacher, or other persons be held accountable if the child does not achieve the growth projected in the written statement.

COLLECTIVE BARGAINING

Comment: Numerous commenters recommended that the regulations deal with the fact that the required participation of teachers (and other agency staff) in the meetings to develop IEPs would require modification of collective bargaining agreements. Some commenters urged that the regulations require additional compensation for teachers to participate in these meetings, prescribe or limit any after-school-hours participation, and specify arrangements for relieving teachers from classroom duties for the meetings.

Response: No change has been made in the regulation. The requirement for teacher participation in developing IEPs is statutory. The Commissioner understands that collective bargaining agreements and individual annual contracts for teachers vary greatly among local educational agencies and may or may not deal with additional duties and compensation for after-hour activities. In some instances, especially in urbanized and highly unionized areas, collective bargaining agreements may have to be renegotiated to cover employee participation in IEPs. However, this is an area which is solely within the authority of the public agency and its employees (and their union representative, if any). It would be inappropriate and beyond the scope of the Commissioner's authority to prescribe how this requirement must be met. Where collective bargaining agreements must be modified, the public agency must negotiate the appropriate modifications to comply with the statute. The public agency is also responsible for insuring that the IEP meetings are conducted at a time reasonably convenient to parents. (In some cases this may be during school hours; in others, after hours.) The agency also must make its own arrangements for covering classrooms when teachers are absent.

DIRECT SERVICES BY THE STATE EDUCATIONAL AGENCY

The direct services provision of this subpart includes sections on (1) use of local educational agency (LEA) funds, (2) nature and location of services, (3) use of the State's (SEA's) entitlement, and (4) a State matching requirement.

The section on the use of LEA allocations (renumbered section 121a.360) has been redrafted to combine the proposed paragraphs (a) and (b) into a single paragraph. This paragraph sets out the conditions under which an SEA may use an LEA's entitlement.

A new paragraph (b) has been added to section 121a.360, which states that in meeting the requirements of this section, the SEA may provide special education and related services directly, by contract, or through other arrangements.

A new paragraph (c) has been added, which repeats the statutory provision that the excess cost requirement does not apply to State educational agencies.

Section 121a.360 (Nature and location of services) has been amended to correct an error made in the proposed rule. The proposed regulation stated that the least restrictive environment (LRE) provisions do not apply when the SEA provides direct services. The amended rule now states that the manner in which the education and services are provided must be consistent with the requirements of this part (including the LRE provisions).

The regulation on "State matching" was not substantially changed. However, a comment was added after this section to make it clear that the requirement would be satisfied if the State can document that the amount of State funds expended on each major program area (e.g., the comprehensive system of personnel development) is at least equal to the expenditure of Federal funds in that program area.

Comment: In the preamble to the proposed rules under the direct services provision, a point was made that an LEA would not be in compliance with the section 504 regulations if that agency did not make available a free appropriate public education (FAPE) to all of its handicapped children. A commenter, in responding to this statement, pointed out that the term FAPE has different meanings under section 504 and Pub. L. 94-142; and, therefore, an LEA would not have to meet the requirements of Pub. L. 94-142 in order to be in compliance with section 504.

Response. Under Part B, "FAPE" is a statutory term which requires services to be provided in accordance with an IEP. However, under the section 504 regulations, each recipient must provide an education which includes services that are "designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met • • •" Those regulations state that implementation of an IEP, in accordance with Part B, is one means of meeting the "FAPE" requirement. (NOTE.—A more detailed description of the relationship between section 504 and Pub. L. 94-142 is included in this appendix.)

Other changes: A new section 121a.372 has been added to implement section 611(c)(3) of the Act. This section provides that the nonsupplanting requirement does not apply to the State's expenditure of its allocation beginning with funds appropriated for Fiscal Year 1979 and for each following fiscal year.

COMPREHENSIVE SYSTEM OF PERSONNEL DEVELOPMENT

GENERAL

The proposed rules in this section created some controversy over the amount of detail contained in the regulations. Comments ranged from requests for more specificity to suggestions that everything be deleted except the statutory language.

The statute is very clear in requiring that a "comprehensive system of personnel development" be implemented in each State. Since this is a broad requirement, challenging each State to reach out to the expansive community of agencies involved in preparing personnel to educate the handicapped, many of which are private and not under the control of the State, it was felt that a regulation was needed that would provide sufficient information for the State and involved agencies to understand their responsibilities in achieving compliance.

SCOPE OF SYSTEM (§ 121a.380)

Comment: A commenter suggested that inservice education be available to all special, regular, and related service personnel.

Response: Paragraph (a) of section 121a.380 was changed to read "the inservice training of general and special educational instructional, related services, and support personnel."

Comment: A commenter suggested that all personnel preparation services be conducted in accredited institutions granting advanced degrees and that "no less than ten percent of the money under this Act be contracted to institutions of higher education." Another commenter recommended the earmarking of a percentage of funds for staff and program development.

Response: No change has been made in the regulations. The Office of Education believes that each State must have maximum latitude in decisions regarding the types of facilities and personnel that are used to implement the comprehensive system of personnel development.

With respect to targeting funds for training, the Office of Education feels that such a step would be inappropriate at this time.

Part B is a unique Federal statute in that it imposes requirements on States which must be implemented, regardless of the amount of Federal funds available. Given the scope and magnitude of the law, the Office of Education believes that each State should have maximum latitude in terms of how its Part B funds are used to implement the various statutory provisions, subject, of course, to the priority requirements in Subpart C.

DEFINITION OF "APPROPRIATELY AND ADEQUATELY PREPARED AND TRAINED" (PROPOSED §121a.261)

A number of comments were received on the definition of "appropriately and adequately prepared and trained" which was in § 121a.261 of the proposed rules. The definition has been deleted in the final regulations. Instead, the term "qualified" is used, as defined in § 121a.12.

Comment: A commenter suggested that nationwide certification requirements be mandated to allow for the mobility of personnel.

Response: No change has been made. The intent of the Act is to insure that all personnel necessary to carry out the purposes of the Act are qualified. The Act does not authorize the establishment of national certification standards.

Comment: A commenter suggested that early childhood be required as an area for certification.

Response: No change has been made. These personnel must be included under the State's comprehensive personnel development system.

Comment: Several commenters expressed the belief that certification should not be required for all personnel directly serving the handicapped, or that such a requirement would result in great expense for the State. Still others felt that competency based systems should be used as opposed to the requirement for certification, registration, or licensing.

Response: The statutory language "appropriately and adequately prepared and trained" has been interpreted, by use of the term "qualified," to mean certification, registration, or licensing. These are commonly accepted procedures for determining if personnel are "appropriately and adequately prepared and trained."

PARTICIPATION OF OTHER AGENCIES AND INSTITUTIONS (§ 121a.381)

The comments on the level and intensity of the "participation" required in this section ranged from the belief expressed that special meetings on components of the state plan are not required in the Act, therefore the "participation" envisioned in section 121a.381 should be eliminated, to the suggested requirement that organizations not only have an opportunity to participate, but that they "must participate." The comprehensive system of personnel development is such a specialized aspect of the Act, necessarily involving agencies not under the jurisdiction of the State that "participation" is fully warranted, though not mandated in the statute. Thus, the regulations set a requirement for the State to insure that those agencies with an interest in the preparation of personnel for the education of the handicapped have an opportunity to participate fully in the development, review, and updating of the system. This is a reasonable requirement, especially considering the critical effect the system will have on those agencies preparing the personnel. Rather than a burden on the State, the "participation" should provide the direct opportunity for the State to encourage the development of quality personnel preparation programs, a factor essential to the provision of a "free appropriate public education."

Comment: Several commenters suggested that "representatives from each group be included in the planning" as well as parents. One commenter suggested that disability categories and groups be listed in the proposed rule.

Response: The regulation has been altered to include representatives of handicapped and parent organizations. This wording should be sufficient to involve all relevant groups.

Comment: A commenter suggested the addition of a subsection (3) to section 121a.381(b) that would require the annual program plan to include a description of agency responsibilities with respect to research and evaluation of exemplary programs that could be implemented in local educational settings.

Response: Sections 121a.385 and 121a.386 have been modified to classify agency responsibilities.

INSERVICE TRAINING (§ 121a.382)

Comment: There were a number of contrasting points of view and suggestions on this section, ranging from requests to mandate greater detail in the proposed rules, to the suggestion that the section be deleted altogether. Those proposing greater detail suggested that specific knowledge and areas of learning be emphasized and that teachers be trained "by having them work one-to-one with specialists" and that "inservice training be mandated at the local level, a county being the largest unit possible, to prevent the State from using the money for ineffectual regional workshops." Also, there were suggestions that where academic credit is to be made available that this be done

only in institutions of higher education with State approved programs.

On the other extreme there were suggestions that this section "exceeds statutory requirements" and "federal rules should not say how a task is accomplished" and "(state) provides adequate training and inservice and does not need more obstacles and regulations."

Response: The statute clearly requires inservice education as a central part of the comprehensive system of personnel development and it is appropriate for the rules to detail the nature and extent of the inservice education that is required. This has been accomplished through the outlining of procedures which define inservice education, its parameters, and relationship to required needs assessments. However, the rules do not define the specific nature of the training to be accomplished. Thus, the rules have been designed to outline the foundation for an adequate program of inservice education, without stifling the creativity of State and local personnel in their efforts to plan and implement such a system.

Comment: A commenter suggested that the statement "in cooperation with institutions of higher education" be inserted in section 121a.383(b)(1).

Response: No change has been made. However, involvement of institutions of higher education is required under § 121a.381(a).

Comment: A number of commenters suggested the addition of specific disciplines and professionals to this section, constituting an itemized list of personnel to be trained or involved in the review of training needs.

Response: No change has been made. The State's plan must include all personnel who need training.

Comment: Several commenters suggested wording changes designed to clarify the text of the proposed rule on inservice training.

Response: Changes were made where necessary to bring the regulation into conformity with current usage.

Comment: There were a number of suggestions concerning the financial arrangements for conducting inservice training. Some commenters advocated the funding of parent groups to conduct inservice training. Others suggested financial support for trainees involved in their programs. One commenter urged that the rule allow for contracting with other than non-profit organizations. One suggested contracts with institutions of higher education to carry out personnel development programs. Another suggested incentives for teacher participation, including released time and college credit. One suggested that inservice be provided during contract time, not involving extra hours.

Response: No substantive changes have been made. All of the suggestions in the above comments are authorized under these regulations.

PERSONNEL DEVELOPMENT PLAN (§ 121a.383)

Comment: Several commenters asked for special attention to physical education and service delivery models which take into account problems of rural families.

Response: No change has been made. Specialized needs in physical education and the unique aspects of providing services in rural settings should be addressed as appropriate in the needs assessment and plan.

Comment: One commenter objected to including preservice training under this section.

Response: No change has been made. The term "inservice" education is used in the Act. However, since the Act clearly requires that a "comprehensive system of personnel development" be developed, such a system must include the consideration of preservice training.

NOTE.—The data required in sections 121a.124 and 121a.126 of Subpart B on the numbers of handicapped children and the kind and number of personnel needed will serve as the uniform data base within the State for the personnel development system under § 121a.383 of this subpart. The data may also be used by institutions of higher education and other nonprofit educational training agencies in submitting personnel preparation applications under Part D of the Act. Section 121f.9 of the regulations under Part D (45 CFR 121f.9) provides as follows:

§ 121f.9 *State personnel needs.*

Each application shall include (a) a statement by the State educational agency of personnel needs for education of the handicapped and a statement by the applicant of how the proposed program relates to those stated needs, and (b) a description of the ways in which the recipient's program goals and objectives relate to the purposes of Part D of the Act.

(20 U.S.C. 1431, 1432, 1434)

DISSEMINATION (§121a.384)

Comment: One commenter suggested that "teachers organizations" be specified as recipients of information.

Responses: No change has been made. Teacher organizations are included under the phrase "other interested agencies and organizations."

SUBPART D—PRIVATE SCHOOLS

The proposed rules created a certain amount of confusion among commenters in distinguishing between handicapped children placed in or referred to private schools by the State or by local educational agencies and handicapped children whose parents choose to educate them in private schools. The major difference between these two groups of children is in who bears the cost of the private school.

A free appropriate public education must be made available to each handicapped child by the public agencies of the State. Subject to the requirements on least restrictive environment, this could include placement in or referral to a private school or facility. Such a placement or referral must be at no cost to the parent.

On the other hand, even if a free appropriate public education is available, the parent may choose not to accept it. The parent may choose to send the child to a private school rather than take advantage of the free public education. If this happens, the Act does not require the State or local educational agency to bear the cost of the private school. For children placed in private schools by their parents, the State and its local educational agencies have a different duty. They must design their program so that handicapped children in those private schools can participate in special education and related services offered by the local educational agencies if the parents of those children so desire.

The regulations have been reorganized to make these distinctions clearer. The first set of sections (121a.400–121a.403) now cover children placed in or referred to private schools or facilities by a public agency in order to provide them with special education or related services. (These sections replace sections 121a.320–121a.323 of the proposed rules.)

Since the "State" includes all of its political subdivisions, the term "public agency" is used, as elsewhere in the regulations, to mean all of the political subdivisions of the State which are responsible for providing special education or related services to handicapped children.

The second set of sections (121a.450–121a.460) apply to handicapped children enrolled in private schools or facilities but who are not placed or referred there by a public agency to receive special education or related services. (These sections replace sections 121a.300–121a.306 of the proposed rules.)

The following comments were made regarding proposed Subpart D. Comments which asked for changes not authorized under the statute are not summarized. (Commenters who are concerned about the cost of room and board as a "related service" are referred to section 121a.302 and the discussion of that section in this preamble.) The comments are arranged in order of the final rules.

RESPONSIBILITY OF STATE EDUCATIONAL AGENCY (§ 121a.401)

Comment: A commenter asked that paragraph (a)(3) be deleted, which required that the special education given to a handicapped child placed by a public agency must meet the education standards of the State educational agency (SEA). The commenter stated that otherwise there would be conflicts between the SEA's standards and those of other agencies, in the day care area, for example.

Response. Paragraph (a)(3) cannot be deleted, since it is derived from a statutory requirement. However, it has been revised by using the language of the statute. This will broaden the types of standards that the SEA may apply, and therefore avoid conflict with other mandatory standards. Of course, those standards cannot override the provisions in Part B of the Act.

Comment: A commenter asked that provision be made for interstate referrals to private schools and communication among States regarding those referrals.

Response. No change has been made in the regulation. Referrals between States are to be handled under existing procedures. Unless a problem develops in this area that seriously interferes with the rights of handicapped children or their parents under Part B, the Office of Education is reluctant to regulate the mechanisms by which the States arrange to provide services.

IMPLEMENTATION BY SEA (§121a.402)

Comment: A commenter suggested that the State educational agency insure the monitoring of private schools, dissemination of standards to them, and involving them in developing State standards, rather than the State educational agency doing it directly.

Response: No change has been made. The statute places direct responsibility on the State educational agency to administer and monitor the requirements under Part B. While the State educational agency in many areas need only insure that the Part B requirements are met, monitoring must be done by the agency itself. Dissemination of standards could be done in a variety of ways. Involvement in development of State standards would have to be done directly by the State educational agency if it is the agency that develops those standards.

PLACEMENT OF CHILDREN BY PARENTS (§ 121a.403)

Comment: Commenters were concerned with the effect of this section on the rights of handicapped children in private schools and felt that the section was worded in a manner that would limit those rights.

Response: The section has been revised to make it clear that a free appropriate public education (FAPE) must be made available to

each handicapped child. This would include the development of an individualized education program and placement in the least restrictive environment. Free appropriate public education must be made available at no cost to the parents. If the parents felt that services were not adequate, they may have a due process hearing to show that more or better services must be provided to give their child FAPE. However, if the parents choose not to educate their child in the public school system, they are not required to do so. In that case, the relevant public agency has the remaining duty of offering special education and related services under sections 121a.450–121a.460, but does not have the duty of insuring that the private school meets the requirements of Part B (unless other handicapped children have been placed in or referred to that private school by the agency), or of paying for the cost of the private school. Language has been added to clarify the public agency's duties under sections 121a.450–121a.460.

Other changes: Proposed section 121a.323 (Placements in another State) has been deleted. It would have required private schools to meet the standards of both the sending and receiving States. This would have been an unreasonable burden on the receiving State to enforce.

HANDICAPPED CHILDREN IN PRIVATE SCHOOLS NOT PLACED OR REFERRED BY PUBLIC AGENCIES (§§ 121a.450–121a.460)

Comments: A number of commenters felt that clarification was needed in these sections. There was also some concern expressed regarding the State's legal authority to provide services to children enrolled in private schools.

Response: The regulations have been amended to conform more closely to those under Title I of the Elementary and Secondary Education Act of 1965 (education of educationally deprived children) (45 CFR, Section 116a.23). As under Title I, a balance is drawn between the statutory requirement to provide services, and the constitutional necessity of avoiding excessive entanglements between public agencies and church-related institutions. It is also important for the Office of Education to have a uniform policy regarding services to private school children under all Federal education programs it administers. The amendments to the proposed rules should serve all of these purposes.

SUBPART E—PROCEDURAL SAFEGUARDS

This subpart implements the procedural safeguards set forth in the Act, including due process procedures for parents and children, protection in evaluation procedures, least restrictive environment, confidentiality of information, and procedures of the Office of Education.

A substantial number of detailed comments were received on these sections. Many concerned the statute rather than the regulations or did not state what changes in the regulations were desired. Others requested revisions which did not appear to involve substantive changes. Some comments sought substantially more detailed specification of due process rights while others indicated that the statute itself was so detailed in the due process area that the regulations should not go beyond the statute.

As stated earlier in this preamble, the Office of Education's position, while incorporating a number of the suggestions in the final regulations, is still to adopt minimum regulations in this area at this time, review experience under the regulations, and then made a determination as to whether more detailed regulations are required.

DUE PROCESS PROCEDURES FOR PARENTS AND CHILDREN

DEFINITIONS (§ 121a.500)

Comment: Commenters recommended that the phrase "unless it is clearly not feasible to do so" be deleted from the definition of consent and that additions be made to make it clear that consent may be revoked and may not be made a precondition to the child's right to participate in basic educational programs. The effect of deleting the phrase would be to require that a consent is not valid unless the parent is informed in every case of the information relevant to the consent.

Response: The phrase has been deleted. The deletion of the phrase will help to assure an informed consent in every case, regardless of the parent's language or other mode of communication. A phrase has been added to make it clear that parents have the right to revoke consent. A separate section 121a.504 states that consent may not improperly be made a precondition of services. While public agencies must obtain consent for preplacement evaluations or for initial placement, a public agency may not coerce parents to consent by withholding or threatening to withhold other regular education services or extracurricular activities unless the parent consents.

Comment: Several commenters requested changes in the definition of "evaluation" to indicate that an evaluation must be conducted by qualified personnel, that the findings must be reduced to writing, and that it must take into account the child's assets as well as deficits.

Response: No change has been made. The suggestion reagarding qualified personnel is covered under section 121a.532. The Office of Education expects that evaluations will be in writing and that a child's assets will be considered. If a problem develops in this area, the Office of Education will reconsider the necessity for further regulations.

GENERAL RESPONSIBILITY OF PUBLIC AGENCIES (§ 121a.501)

Comment: Commenters suggested that parents have the right to complain and that agencies should be required to respond to them outside of the context of a hearing.

Response: No change has been made in the regulation. However, agencies should certainly seek to respond to complaints by informal discussions and negotiations. A comment section has been added which notes that mediation may be useful in some instances. In any case, negotiations may not delay a hearing if a parent has requested it.

INDEPENDENT EDUCATIONAL EVALUATION (§ 121a.503)

Comment: Commenters disagreed as to whether the parent's right to an independent evaluation should be broadened or narrowed.

Response: The section has been rewritten to require public agencies to provide parents information, upon request, of where an independent educational evaluation may be obtained. Also, "public expense" has been defined. However, the interpretation in the proposed regulations is retained. The evaluation must be at public expense if the parent disagrees with the evaluation by the public agency, unless the public agency initiates a hearing to show that its evaluation is appropriate. If upheld, the expense of the independent evaluation does not have to be borne by the agency. The independent evaluation must be considered in any hearing.

There are several competing interests which the regulation seeks to balance. The statutory right of the parent to an independent educational evaluation must be preserved. On the other hand, the public agencies should not be asked to bear the costs of unreasonably expensive independent evaluations. Also, for the independent evaluation to be useful, it must meet the same criteria as evaluations conducted by public agencies under this part.

PRIOR NOTICE; PARENT CONSENT AND CONTENT OF NOTICE (§§ 121a.504–121a.505)

Comment: Commenters sought further specificity as to the detail of information provided to parents in the notice. Other commenters felt that the requirements were too demanding. Some commenters asked that consent be required for preplacement evaluation and prior notice for reevaluation; and that consent be extended to include permission for placement. Other commenters sought to delete the consent requirement on the grounds that educational judgments should be final.

Response: The basic notice requirements in sections 121a.504 and 121a.505 were not changed. However, the following changes were made in the consent requirements:

(1) Consent was expanded to include permission for initial placement of a handicapped child in a special education program. Many commenters had requested this addition; and the Office of Education agrees that this requirement is as essential as consent for preplacement evaluation.

(2) The proposed consent rule was changed from consent for all evaluations to consent for the initial or preplacement evaluation. This change is essentially consistent with the section 504 final regulations (45 CFR Part 84, § 84.35(a).). The Office of Education agrees with commenters that there is no need to require consent for reevaluation. If a handicapped child is initially placed in accordance with section 121a.504, and if his or her individualized education program is annually reviewed in accordance with section 121a.343 of Subpart C, a requirement is not necessary. However, prior notice would have to be provided.

Comment: Commenters were especially concerned that clarification be added regarding procedures for overriding parents' refusal to consent.

Response: A subsection has been added to set out procedures for dealing with parental refusal to consent (see section 121a.504(c) and the comment following that section).

The procedures are designed not to interfere with existing State laws which may require consent. Where State law does not require consent, the parent is afforded a due process hearing under this Part. These rules should provide protection to the parent, the child, and the public agency.

IMPARTIAL DUE PROCESS HEARING (§ 121a.506)

Comment: A commenter asked that the regulations specify that the public agency must pay for the hearing.

Response: The change requested by the commenter has not been made. Since the statute requires that the public agency must afford parents an opportunity for a hearing, the agency must bear the cost of the hearing, except for paying for parents' representatives and witnesses. However, section 121a.506 has been amended to require agencies to provide parents with information about free or low-cost legal and other relevant services that are available.

IMPARTIAL HEARING OFFICER (§ 121a.507)

Comment: Commenters sought to have three-person panels, including parents, serve as the hearing officials. Some sought to allow and others sought not to allow school board officials from serving as hearing officials. Com-

menters also asked that lists of hearing officers be required, including their qualifications.

Response: A requirement has been added that each public agency keep a list of persons who serve as hearing officers and a statement of their qualifications. This should help to ensure that the requirement for impartiality is met. No other substantive change has been made. A three-person panel could be used under the existing rules, as long as the conditions of impartiality are met. However, a parent of the child in question and school board officials are disqualified under section 121a.508.

HEARING RIGHTS (§ 121a.508)

Comment: Commenters disagreed as to whether hearing rights set forth in the proposed rules should be expanded or restricted. Among the additional rights sought were the right to compel the attendance of witnesses, prohibit the introduction of evidence not disclosed prior to the hearing, allow the child to be present and the hearing to be open to the public at the parents' discretion, and to specify whether the record of the hearing must be free or at reasonable cost.

Response: The section has been revised to add rights for any party to prohibit the introduction of evidence not previously disclosed to the other party and for the child to be present and the hearing to be open to the public. The purpose of hearings under this part is to ensure that handicapped children are provided free appropriate public education. Opening up the hearing and the evidence that may be presented should serve to insure that the result of a hearing will be in the best interests of the child. No provision has been added relating to cost. However, it is expected that a copy of any decision would be provided to the parent at no cost.

HEARING DECISION; APPEAL (§ 121a.509)

Comment: A commenter sought to add a requirement that specifies that the hearing officer has the power to order any educational program for the child and that his or her power not be limited to accepting or rejecting the program by the public agency or parent.

Response: No change is necessary. The hearing officer has the function to decide what placement is appropriate, if that is the subject of the hearing.

ADMINISTRATIVE APPEAL; IMPARTIAL REVIEW (§ 121a.510)

Comment: Commenters disagreed on whether to reduce or expand the requirements in this section. Some commenters wanted short, specific timelines set out for various actions and specification of the rights that apply at the review level.

Response: The section has been revised to specify other duties and powers of the reviewing official, in addition to those already set out. For example, the official may seek additional evidence if necessary, including holding a new hearing and affording the parties an opportunity for written as well as oral argument (at the reviewing official's discretion). The reviewing official must give a copy of the written findings and decision to the parties. These duties and powers are regarded as necessary to insure that a full review will be conducted and that all parties will be informed of the result of the review. Revisions to timelines for any hearing or review are set out in section 121a.512.

CIVIL ACTION (§ 121a.511)

Comment: Commenters wanted the regulations revised to allow for direct appeal to the courts without first using administrative hearing and review procedures if those procedures would be futile, the timeliness or adequacy of the administrative proceedings are being challenged, or a class action is involved. Commenters cited language in the Congressional Record in support of this interpretation (121 Cong. Rec. S20433 daily ed., November 19, 1975).

Response: No change has been made. The legislative history cited is nongermane as it was made in reference to the Senate Bill (S. 6) which did not contain the final statutory provision on civil actions. The provision on civil action was added as a Conference substitute. The issue of exhaustion of remedies will be up to the courts to resolve.

TIMELINESS AND CONVENIENCE OF HEARINGS AND REVIEWS (§ 121a.512)

Comment: Commenters wanted clarification of the 45-day time limit for commencing and completing a hearing and review set out in the proposed regulations. They disagreed on whether the time should be shortened or lengthened.

Response: The section has been revised to set a 45 day time limit for a hearing and a 30 day limit for a State level review. In both instances, a decision must be reached and mailed to each of the parties within the time limits set. A hearing or reviewing officer may grant specific extensions, at his or her discretion, at the request of either party. The Office of Education believes reasonable outside time limits must be set to insure resolution of any dispute quickly so that the child's special education may proceed. Discretion for specific extensions is consistent with normal judicial and administrative practice.

CHILD'S STATUS DURING PROCEEDINGS (§ 121a.513)

Comment: Commenters suggested a provision be added to allow change of placement for health or safety reasons. One commenter requested that the regulations indicate that suspension not be considered a change in placement. Another commenter wanted more specificity to make it clear that where an initial placement is involved, the child be placed in the regular education program or, if the parents agree, in an interim special placement.

Response: A comment has been added to make it clear that this section would not preclude a public agency from using its regular procedures for dealing with emergencies.

SURROGATE PARENTS (§ 121a.514)

Comment: Commenters requested that the regulations clarify when surrogates may be appointed. One reason given was to insure that agencies do not attempt to appoint surrogates when parents are uncooperative or nonresponsive.

Response: The section has been revised to make it clear that the requirements for appointing surrogates apply only when no parent can be identified, the agency after reasonable efforts cannot discover the whereabouts of a parent, or the child is a ward of the State. Agencies are not allowed to appoint surrogates when parents are uncooperative or nonresponsive.

Comment: Commenters requested that the regulations further specify procedures to be used for the appointment of surrogates, including administrative proceedings with notice to interested parties and the right of interested parties to seek a review of the decision.

Response: No change has been made. State procedures for the appointment of surrogates will be followed. Disagreements about the choice of surrogates may be the subject of a due process hearing under section 121a.506.

Comment: A number of commenters suggested that the regulations provide more detail about the qualifications of the surrogates (for example, requiring training and a commitment to becoming acquainted with the child).

Response: No change has been made. The Office of Education believes these concerns are covered by section 121a.514(c)(2) which requires that the surrogate have knowledge and skills that insure adequate representation of the child.

Comment: A number of commenters were concerned about the legal liability of surrogates. Some commenters wanted the regulations to protect surrogates from any legal liability.

Response: No change has been made. The legal liability of surrogates will be determined under State law relating to such matters as breach of fiduciary duty, negligence, and conflict of interest. The Federal government has no authority to limit legal liability.

Comment: A number of commenters sought clarification regarding which agency employees could serve as surrogates. For example, one commenter wanted the regulations to indicate whether the head of a State institution could serve as the surrogate.

Response: The regulation has been reworded to make it clear that no employee of any agency involved in the education or care of the child may serve as the surrogate parent.

PROTECTION IN EVALUATION PROCEDURES

Section 612(5)(C) of the Act requires States to establish non-discriminatory testing procedures for use in the evaluation and placement of handicapped children. The requirements for public agencies to follow in carrying out this provision are set forth in sections 121a.530–121a.534 of Subpart E. (These section numbers have been changed to correspond with other number changes in Subpart E.)

The evaluation procedures in the proposed rules have been changed to conform to the corresponding requirements in the final regulations for section 504 of the Rehabilitation Act of 1973 (45 CFR Part 84, § 84.35) and in response to other comments received. (Many of the comments dealing with the language and substance of the proposed evaluation procedures are covered by the above conforming changes.) A summary of the changes in these procedures is included below:

(1) Proposed section 121a.431 ("Evaluation; change in placement") has been replaced with new section 121a.531 ("Preplacement evaluation"). This corresponds to section 84.35(a) of Part 84.

(2) Proposed section 121a.432 ("Evaluation procedures") has been divided into two sections (section 121a.532 "Evaluation procedures" and section 121a.533, "Placement procedures"). The new section on evaluation procedures (a) incorporates essentially verbatim the language of section 84.35(b) of Part 84, (b) adds two additional requirements from section 612(5)(C) of the Act which are not in Part 84 (e.g., the provision on native language, and the requirement that "No single procedure is used as the sole criterion for determining an appropriate educational program for a child"), and (c) requires that the evaluation be made by a "multidisciplinary team • • • including at least one teacher or other specialist with knowledge in the area of identified disability • • •"

(3) The new section on placement procedures incorporates essentially verbatim the language in section 84.35(c) of Part 84. In addition, the section ties the development

of an individualized education program to the placement procedures.

The following additional comments were made regarding evaluation procedures:

Comment: Several commenters felt that the regulations should require State and local educational agencies to develop procedures for the conduct of evaluations. This would make it possible to determine the adequacy of the evaluations and to insure uniformity in basic procedures.

Response: A paragraph was added to section 121a.530 (General) which requires the State educational agency to insure that each public agency establishes and implements evaluation—placement procedures.

Comment: Several commenters felt that timelines should be set for implementing the evaluation process (e.g., for initial referral to evaluation and placement).

Response: No change has been made. The Office of Education has elected to impose very few absolute timelines in the regulations for this part, because of the potential administrative and legal problems they can cause. Imposing timelines can actually delay the provision of a service (for example, if the time periods are regarded as both minimum and maximum times for implementing a procedure).

A child should be evaluated as soon as possible following referral. Any undue delay in providing the evaluation would raise the question of the State and local educational agencies' compliance with sections 121a.128 and 121a.220 (identification and evaluation of all handicapped children).

Comment: Some commenters requested clarification regarding whether a reevaluation is needed, as required by proposed section 121a.431(a)(2), if the parents and agency agree that the child should be transferred from a special education program to a full time regular class placement.

Response: This specific section has been deleted in the final regulations. However, any changes in a child's placement (including a transfer to a regular class) would not be made until after a meeting is held to review the child's individualized education program in accordance with the requirements under sections 121a.340–121a.349 of Subpart C. If the parents and agency agree that the child no longer needs special education, a reevaluation would not be necessary. Section 121a.531 requires an evaluation before initial placement only. Reevaluations are covered under section 121a.534.

LEAST RESTRICTIVE ENVIRONMENT

Section 612(5)(B) of the Act requires States to establish policies and procedures to insure that "to the maximum extent appropriate, handicapped children • • • are educated with nonhandicapped children • • •." The regulations for implementing this provision are set out in sections 121a.-550–121a.556 of Subpart E.

A new paragraph was added to section 121a.550 which requires the State to insure that all public agencies establish and implement procedures in accordance with the requirements of this subpart. In addition, a new section, entitled "Nonacademic settings" was added. This section is taken from a new requirement in the section 504 regulations (45 CFR Part 84, § 84.34).

GENERAL (§ 121a.550)

Comment: A number of commenters requested that provisions be made for special support in the regular classroom in order to accommodate handicapped children (e.g., including reducing the pupil-teacher ratio and assigning aides to the room).

Response: No change was made, since the statute already authorizes the use of supplementary aids and services as a means of enabling a handicapped child to be educated with nonhandicapped children.

CONTINUUM OF ALTERNATIVE PLACEMENTS (§ 121a.551)

Comment: Many commenters responded to this requirement. Some felt that terms other than "continuum" should be used (e.g., "range of programs" and "variety of services"). A large number of commenters felt that "continuum" carried negative connotations (e.g., statements were made that the concept undermines the ideals of Pub. L. 94–142, that it implies best-to-worst, etc.). Other commenters felt that it discriminated against residential or private schools, and suggested that efforts be made to counteract this bias.

Response: No change has been made in this section. The term "continuum," as with "least restrictive environment" (LRE), is commonly used by agencies, advocates, and parents. However, there is nothing to prohibit an agency from using terms such as those included above in administering these provisions.

As with "LRE," the term that is used is not as important as the basic provision and how that provision is implemented. The purpose of a continuum is to be able to accommodate to differences between handicapped children in terms of the degree of special assistance they need to receive a free appropriate public education. This matter was dealt with directly in the June 26, 1975 Report of the House of Representatives on HR 7217 (H. Rept. No. 94–332, p. 9):

The Committee understands the importance of providing educational services to each handicapped child according to his or her individual needs. These needs may entail instruction to be given in varying environments, i.e., hospital, home, school or institution. The Committee urges that where possible and where most beneficial to the child, special educational services be provided in a classroom situation. An optimal situation, of course, would be one in which the child is placed in a regular classroom. The Committee recognizes that this is not always the most beneficial place of instruction. No child should be denied an educational opportunity; therefore, H.R. 7217 expands special educational services to be provided in hospitals, in the home, and in institutions.

When it is clear that, because of the nature or severity of a child's handicap, the child must be educated in a setting other than the regular class, it is appropriate to implement such a placement. However, the LRE provision is also designed as a rights provision to protect against indiscriminate placement of a child in a separate facility solely because the child is handicapped and not because special education is needed in that type of setting.

Even with respect to severely handicapped children, it may be possible to meet the "regular education setting" goal by having a separate class or separate wing in a regular school building.

PLACEMENTS (§ 121a.552)

Comment: Many commenters were concerned that there may be an overzealous implementation of the LRE provision without regard to the needs of individual handicapped or nonhandicapped children.

Response: No substantive change has been made in this section, because the Office of Education feels that the section includes necessary safeguards to insure protection against the above concerns. With respect to those concerns, the overriding rule is that each child's placement must be determined annually and be based on his or her individualized education program.

With respect to concerns about the harmful effect of placing handicapped children in regular classes, the analysis of the section 504 regulations indicates: "• • • it should be stressed that, where a handicapped child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore regular placement would not be appropriate to his or her needs • • •" (45 CFR Part 84—Appendix, paragraph 24)

Comment: A commenter requested that a new provision be added which requires State and local educational agencies to utilize community-based early childhood development programs for 3–5 year old handicapped children. The main intent of the new provision is "aimed solely at assuring maximum appropriate mainstreaming."

Response: No change was made in the section. The existing provisions are considered to be adequate to cover the intent of this request.

CONFIDENTIALITY OF INFORMATION

NOTICE TO PARENTS (§ 121a.561)

Comment: Commenters asked that the detailed content of the notice requirements be deleted as excessive.

Response: No change has been made. The Office of Education believes the provisions require that States provide necessary information to inform parents about the type of information collected about handicapped children to meet the requirements of this part.

ACCESS RIGHTS (§ 121a.562)

Comment: Commenters requested that this section be expanded to require that access to records be given in no case less than five days prior to meetings to develop individualized education programs or any hearing and to permit authorized representatives of the parent to inspect the record. A commenter felt the 45-day outside time limitation could be misinterpreted to mean an agency need not comply at all after 45 days from the date of the request.

Response: Language has been added to make it clear that an agency must comply with a request for access before any meeting regarding an individualized education program. This will help insure that interested parents are able to familiarize themselves with their child's records prior to any meeting and be able to participate more knowledgeably. The prohibition against unnecessary delay places an obligation on the agency to make the records available in a timely manner so that the Office of Education does not believe it is necessary to specify a specific time limitation. Section 121a.562 has been amended to give parents the right to have an authorized representative inspect their child's education records.

The 45-day time limitation is not subject to the misinterpretation the commenter fears. This language is from the Family Educational Rights and Privacy Act, section 438 of the General Education Provisions Act (specifically section 432(a)(1)(A)), to which these regulations are tied (by statute).

FEES (§ 121a.566)

Comment: A commenter felt the first copy of a record should be given free upon request from the parents.

Response: No change has been made. The prohibition against charging a fee if it would effectively prevent the parents from inspecting and reviewing the record is based on a requirement in the Family Educational Rights and Privacy Act, to which these regulations are limited by statute (section 612

(2)(C)). Agencies may of course adopt policies of making copies available free of charge and are encouraged to do so.

HEARING PROCEDURES (§ 121a.570)

Comment: A commenter requested clarification of who conducts a hearing.

Response: The section states that the procedures under § 99.22 (the hearing procedures in the regulations for the Family Educational Rights and Privacy Act) be used. Section 99.22(b) states the hearing may be conducted by any party, including an official of the educational agency or institution, who does not have a direct interest in the outcome of the hearing.

CONSENT (§ 121a.571)

Comment: Commenters requested that "advanced students," "persons acting as practicum advisors," and researchers be given access to records without consent.

Response: No change has been made. The Family Educational Rights and Privacy Act specifically lists parties and conditions where records may be released without parental consent.

SAFEGUARDS (§ 121a.572)

Comment: A commenter requested a list of positions rather than a list of names of employees who may have access to personally identifiable information.

Response: The requirement has been modified to require a list of names and positions to more fully inform parents and the public of the categories of individuals given access to data as well as the specific individuals who may have access.

DESTRUCTION OF INFORMATION (§ 121a.573)

Comment: A number of commenters were concerned about the destruction requirements. The principle concern was that detailed records might be needed by the handicapped individuals to show proof of need for further services from other agencies. One recommendation was that the parent and child be notified of the existence of the records at the time of graduation and informed that they would be destroyed only upon request of the parent or child. Another commenter suggested that records be maintained, but that parents be given the option to have them destroyed.

Response: The requirement has been revised to permit the parents to request that the information be destroyed and to require the public agency to inform the parents of the destruction option and their right to have the records destroyed upon request. The notice would normally be given at the time a child graduates or otherwise leaves the agency. The purpose of the destruction option is to insure that nonessential records about a child's behavior, performance, and abilities, which may possibly by stigmatizing and are highly personal, are not kept after they are no longer needed for educational purposes. Destruction of these records is the best protection against improper or unauthorized disclosures. However, the handicapped child or his or her parents may need certain records for other purposes (such as proof of eligibility for benefits).

Comment: Commenters asked that notice be given to a child who has reached the age of majority.

Response: No change has been made. Section 121a.574 requires the State educational agency to have policies and procedures regarding children's privacy rights. Where education records are maintained by an agency covered under the Family Educational Rights and Privacy Act, these rights must include transfer of the rights of parents to the child when he or she reaches 18 or the postsecondary education level.

Other Changes: The regulations have been revised to make it clear that the records covered under this Act are the same as the type of records covered under the Family Educational Rights and Privacy Act. Consistency in coverage is necessary to avoid undue administrative burdens on public agencies covered by both laws.

OFFICE OF EDUCATION PROCEDURES

General: The requirements in these sections largely repeated the statute. Perhaps for this reason, few comments were received on the Office of Education procedures.

WAIVER OF REQUIREMENT REGARDING SUPPLEMENTING AND SUPPLANTING WITH PART B FUNDS (§ 121a.589)

Comment: A commenter requested that the special study to determine if a waiver of the requirement should be granted include a review of whether grievance procedures are operational. Other commenters disagreed on the need for this study.

Response: A requirement has been added to have the study cover the adequacy of the State's due process procedures, as this is an important part of insuring that grievances are heard and to determine if parents and other parties are satisfied with the adequacy of the State's programs for handicapped children.

WITHHOLDING PAYMENTS (§ 121a.590)

Comment: Commenters asked for definitions of "substantial compliance" and "failure to comply." Commenters also urged that the Office of Education, the Office for Civil Rights, and Departmental audit officials apply the same criteria.

Response: No change has been made. The Office of Education believes these terms will have to be defined on a case-by-case basis.

The Office of Education and the Office for Civil Rights will coordinate and cooperate in enforcing requirements under this Part and Part 84 (the regulations for section 504 of the Rehabilitation Act of 1973) where identical requirements are involved. The Office of Education will make every effort to insure that auditing officials understand and apply any criteria used by program officials.

SUBPART F—STATE ADMINISTRATION

This subpart has been expanded with requirements set out under the major headings: State Educational Agency Responsibilities, Use of Funds, and State Advisory Panel.

STATE EDUCATIONAL AGENCY RESPONSIBILITIES

Provisions on State educational agency responsibilities have been redrafted (and relocated from proposed section 121a.34) in response to comments, to better summarize general administrative and supervisory responsibilities in section 612(6) and other sections of the Act. A section on complaint procedures, which was included in previous regulations for Part B (prior section 121a.14) and inadvertently not included in the proposed regulations has been added.

Comment: Commenters requested addition of a new section on State educational agencies' responsibilities for monitoring, evaluation, and enforcement activities to insure compliance throughout the State with the requirements of this part. The commenters made specific suggestions for implementing such a section, including collection of data, conduct of on-site visits, audit of fund utilization, comparison of written individualized education programs with programs actually provided, meetings with parents and parent groups, public hearings, development of detailed criteria for evaluating program quality and effectiveness, and detailed procedures for enforcing requirements against noncomplying agencies.

Response: A new section has been added to require each State educational agency to develop procedures and specific timelines for monitoring and evaluating public agencies involved in the education of handicapped children. These are minimal requirements. Adoption of the other suggestions made by the commenters is encouraged but not required.

ALLOWABLE COSTS (§ 121a.621)

Comment: A number of commenters requested that the limitation on State administrative funds be raised and that provisions be added to allow local educational agencies to use funds for administrative costs.

Response: No change has been made on the State limit as it is a statutory limitation.

Comment: Commenters requested that the regulations require each State educational agency to use its funds for specific purposes. One recommendaiton was that ten percent of the administrative funds be used to train persons in local communities to assist and represent parents and to prepare and disseminate to parents information about their rights under these regulations. Another was that they be used to disseminate instructional material.

Response: No change has been made. The Office of Education does not believe it is appropriate to dictate to States how to use their limited administrative funds.

STATE ADVISORY PANEL

ESTABLISHMENT (§ 121a.650)

Comment: One commenter recommended that local panels be required.

Response: No change has been made. The statute only requires a State advisory panel. A State may, of course, decide to establish local panels.

MEMBERSHIP (§ 121a.651)

Comment: A substantial number of commenters requested additions to the list of representatives to be included on the panel, including professional groups, legal advocacy groups, and employees of State and local agencies. Some commenters recommended that handicapped individuals or their parents make up specific percentages of the panel.

Response: A provision has been added to make it clear that a State may expand the advisory panel to include additional persons in the groups listed (which are statutory) and representatives of other groups. The Office of Education does not believe it is appropriate to prescribe specific percentages, as the States should have some discretion to determine the proper mix of representatives. A comment has been added to indicate factors a State may consider in determining balanced membership of the panel.

ADVISORY FUNCTIONS AND ADVISORY PANEL PROCEDURES (§§ 121a.652—121a.653)

Comment: Commenters recommended that the regulations indicate that the panel must comment publicly on the State annual program plan as well as on any rules and regulations regarding education of handicapped children, review annual evaluations, and act as ombudspersons to hear complaints.

Response: A change has been made to require the panel to comment on the annual program plan. The annual program plan is an extremely important document and this addition makes it clear that the advisory panel must be involved in reviewing it. The other recommendations are legitimate activities but not ones the Federal government believes should be required by these regulations at this time.

Comment: Commenters requested that the regulations provide that panel members be reimbursed for reasonable and necessary expenses for attending meetings and performing duties.

Response: This change has been made. It is reasonable to require reimbursement for expenses so that persons will be able to participate without financial sacrifice.

SUBPART G—ALLOCATIONS OF FUNDS; REPORTS

ALLOCATIONS

This major section of Subpart G is entirely statutory; therefore, there are no comments of substance on which to respond.

REPORTS—ANNUAL REPORT OF CHILDREN SERVED (§§ 121a.750–121a.754)

The following comments were received regarding the annual report by the States of the number of children receiving special education and related services. This report is the basis for each State's allocation of funds under Part B, and serves as a mechanism for the Commissioner to meet some of his reporting requirements to Congress under section 618 of the Act. Some commenters recommended changes that would require amendment of the Act. These have not been summarized except where further explanation seemed to be useful.

AMOUNT OF INFORMATION REQUIRED IN THE REPORT

Comment: Commenters varied in their views on what information should be included in the report. It was suggested that additional information be collected for compliance purposes. Objections were made to the requirement for reporting information by disability category, and for reporting the 0-2 year old population. On the other hand, some commenters recommended that additional categories be added to the report, particularly for deaf-blind children and for multihandicapped children.

Response: Two categories of handicapped children have been added to the report—one for multihandicapped children and one for deaf-blind children. These terms are defined in section 121a.5 of Subpart A. No other changes have been made on the amount of information to be reported.

The additional categories should help to insure that no handicapped child is counted more than once, since the States will not have to decide in which of two or more disability categories to count a multihandicapped child. The changes conform to existing reporting requirements used by the States.

The annual report of children served is not a compliance document. It is only used to determine each State's allocation and to assist the Commissioner in meeting his reporting requirements to the Congress under section 618. Under section 611 of the Act, allocations are based on the number of handicapped children in each State receiving special education and related services. Compliance with requirements such as "least restrictive environment" will be achieved through other mechanisms, including the State's annual program plan, the local educational agency's application, and monitoring by the State educational agency and the Office of Education.

As explained in the preamble to the proposed rules published in the FEDERAL REGISTER on September 8, 1976, the report requirements are the minimum needed by the Commissioner to carry out the Act. (See 41 FR 37814.) While the Commissioner is concerned about the possible harmful effects of "labeling" children, the Act requires that the Commissioner report a substantial amount of information, to Congress by disability category. For this reason, and for the other reasons stated in the September 8, 1976, FEDERAL REGISTER, there appears to be no workable alternative to retaining the categories in the States' annual reports. The various disability categories, as well as the requirements to use them in the Commissioner's reports to the Congress, are statutory.

WHO MAY BE COUNTED

Comment: Commenters disagreed as to whether handicapped children should be counted if their special education is paid for solely from private sources or solely from Federal funds (such as children living on military bases). Some thought that only publicly-funded special education should qualify, while others argued that since all children have a right to a free appropriate public education the source of funding (other than the parent) should not matter.

Response: Section 121a.753 has been amended to provide that handicapped children (including such children in Head Start or other preschool programs) may be counted only if they (1) are enrolled in a school or program which is operated or supported by a public agency, and (2) receive special education that meets State standards.

A State may not count a child whose special education is paid for solely by the Federal government, unless the child is in one of the age groups 3–5 or 18–21, and there are no local or State funds available for nonhandicapped children in that age group.

Children funded solely by the Federal government would include Indian children whose special education is paid for solely by the Federal government, as well as children on military bases whose education is paid for solely with Federal funds. This rule is consistent with the requirement that a free appropriate public education (FAPE) be made available by the State to each handicapped child. Parents are not required to take advantage of FAPE. If they choose to educate their child outside of the public school system, even though FAPE is available, the State has discharged its responsibility. However, by the same token, the child should not be counted by the State for its allocation if the child is not being provided special education at public expense. The same reasoning applies to Indian children and other children who receive their special education from the Federal government. The rule should serve as an encouragement to States to provide services to all handicapped children, however, since any child provided special education from State or local funds may be counted.

Comment: Two other provisions in the regulations were objected to by commenters. The first of these provided that handicapped children "enrolled" in schools to receive special education could be counted as receiving special education. These commenters felt that enrollment did not guarantee actual receipt of services. The second provision stated, in essence, that a child who receives special education may be counted, but not a child who receives only "related services." This was viewed as an overly restrictive reading of the Act.

Response: No change has been made in the regulations. While no system is perfect, enrollment is a legitimate way of determining the number of handicapped children receiving special education on October 1 and on February 1, the two dates on which the Act requires the count of children served. It would not be practical to make an actual head count of children in classrooms and other facilities where services are provided.

With respect to children who only receive "related services," this is governed by statutory language. "Related services" are only those "required to assist a handicapped child to benefit from special education." (Section 602(17) of the Act.) If a child does not need special education, there can be no "related services," as that term is defined in the Act. However, section 121a.14 permits a State to define certain services as "special education," if those services are "specially designed instruction to meet the unique needs of a handicapped child." (This is taken from the definition of "special education" in section 602(16) of the Act.)

REALLOCATION OF LOCAL EDUCATIONAL AGENCY FUNDS (§ 121a.708)

Comment: Commenters requested criteria be added for when funds may be reallocated.

Response: No criteria have been added as determinations will be made on a case-by-case basis.

APPENDIX B—INDEX TO PART 121a

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See: Monitoring.
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Disclosure of information—§ 121a.571.
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Placement status during a proceeding—§ 121a.513.
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Annual program plan requirement—§ 121a.129.
Definitions—§ 121a.560.
General requirements—§§ 121a.560–121a.572.
Local application requirements—§ 121a.221.

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See: Application of local agency.

COUNT OF CHILDREN

Annual report of children served—§§ 121a.750–121a.754.
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FREE APPROPRIATE PUBLIC EDUCATION

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Time Limits and Timetables.
Annual program plan requirements—§§121a.121–121a.122.
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Due Process.
Evaluation.
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Identification, Location, Evaluation.
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Disapproval of annual program plan—§ 121a.113.
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See: Evaluations.
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Application from Secretary of Interior—§§ 121a.260–121a.263.
Count—§§ 121a.753.
Payments to Secretary of Interior—§ 121a.709.

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Annual program plan requirement—§ 121a.130.
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Defined—§ 121a.340.
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5. A new Part 121m is added to read as follows:

PART 121m—INCENTIVE GRANTS

Sec.
121m. 1 Scope; purpose.
121m. 2 General provisions regulations.
121m. 3 Eligibility.
121m. 4 Application.
121m. 5 Application contents.
121m. 6 Amount of grant.
121m. 7 Participation by children not counted under Part B of the Act.
121m. 8 Excess costs.
121m. 9 Administration.
121m. 10 Annual evaluation report.

AUTHORITY: Sec. 619 of Pub. L. 91-230, as amended, 89 Stat. 793 (20 U.S.C. 1419), unless otherwise noted.

§ 121m.1 Scope; purpose.

(a) This part applies to assistance under section 619 of the Act.

(b) The Commissioner awards a grant to each State which provides special education and related services to handicapped children ages three, four, or five.

(c) The State shall use funds provided under this part to give special education and related services to handicapped children in the age groups named in paragraph (b) of this section.

(d) The terms "special education" and "related services" have the meanings defined in § 121a.12 and § 121a.13 of this chapter.

(20 U.S.C. 1419(c).)

§ 121m.2 General provisions regulations.

Assistance under this part is subject to the requirements in Parts 100, 100b, 100c, and 121 of this chapter (including definitions and fiscal, administrative, property management, and other matters).

(20 U.S.C. 1419.)

§ 121m.3 Eligibility.

A State is eligible to receive a grant if:

(a) The Commissioner has approved its annual program plan under Part 121a of this chapter; and

(b) The State provides special education and related services to any handicapped children aged three, four, or five.

(20 U.S.C. 1419(a).)

§ 121m.4 Application.

To receive funds under this part, a State must submit an application to the Commissioner through its State educational agency.

(20 U.S.C. 1419(b).)

§ 121m.5 Application contents.

An application must include the following material:

(a) A description of the State's goals and objectives for meeting the educational needs of handicapped children ages three through five. These goals and objectives must be consistent with the State's full educational opportunity goal under § 121a.123 of this chapter.

(b) A description of the objectives to be supported by the grant in sufficient

detail to determine what will be achieved with the grant.

(c) A description of the activities to be supported by the grant. The activities must be related to the objectives under paragraph (b) of this section and must be described in sufficient detail to determine how the grant will be used.

(d) A description of the impact the proposed activities will have on handicapped children ages three through five. This description must include evidence that the proposed activities are of sufficient size, scope, and quality to warrant the amount of the expenditure. The application must indicate the number of children to be served and the number of handicapped children who will be benefitted indirectly. If children are to be benefitted indirectly, there must be a rationale that demonstrates the benefit.

(e) The number of local educational agencies or intermediate educational units, and the number and names of other agencies which will provide contractual services under the grant, the activities they will carry out, and the reasons for selecting these agencies.

(f) The dollar amounts that will be spent for each major activity described.

(g) A description of the procedures the State will use to evaluate the extent to which the activities met the objectives described under paragraph (b) of this section.

(20 U.S.C. 1419(b).)

§ 121m.6 Amount of grant.

(a) The amount of a grant is $300 multiplied by the average number of children ages three through five counted during the current school year under §§ 121a.750–121a.754 of this chapter.

(b) If appropriated funds are less than enough to pay in full the grants under this part, the amount of each grant is ratably reduced.

(20 U.S.C. 1419(a), (d).)

§ 121m.7 Allowable expenditures.

(a) The State educational agency may use funds under this part to give special education and related services to handicapped children ages three through five who are not counted under §§ 121a.750–121a.754 of this chapter if the State educational agency insures that those children have all of the rights afforded under part 121a of this chapter.

(b) The State educational agency may use up to five percent of its grant for the costs of administering the funds provided under this part.

(20 U.S.C. 1419(c).)

Comment. In carrying out the provisions of this part some activities are considered particularly appropriate for the use of these funds: (1) Providing parents with child development information; (2) assisting parents in the understanding of the special needs of their handicapped child; (3) providing parent counseling and parent training, where appropriate, to enable parents to work more effectively with their children; (4) providing essential diagnosis and assessment; (5) providing transportation essential to the delivery of services; (6) providing speech therapy, occupational therapy, or physical therapy.

§ 121m.8 Excess costs.

(a) If local or State funds are available to pay for the education of nonhandicapped children of the same age as the handicapped children served with funds under this part, funds equal to that amount must also be made available for these handicapped children.

(b) If no local or State funds are available for nonhandicapped children of the same age, funds under this part may be used to pay for all of the costs directly attributable to the education of the handicapped children.

(20 U.S.C. 1419(c).)

§ 121m.9 Administration.

(a) The State educational agency shall administer the funds provided under this part.

(b) The State educational agency may use the funds itself, or may contract with local educational agencies intermediate educational units, or other agencies.

(20 U.S.C. 1419(a).)

§ 121m.10 Annual evaluation report.

(a) Within 90 days after the end of the grant period, the State educational agency shall submit a report to the Commissioner on the activities carried out under this part during that period.

(b) The report must contain:

(1) The results of the evaluation under § 121m.5(g), and

(2) In brief narrative form, the impact that these funds have had on the State's educational services to handicapped children ages three, four, and five.

(20 U.S.C. 1419(c).)

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